



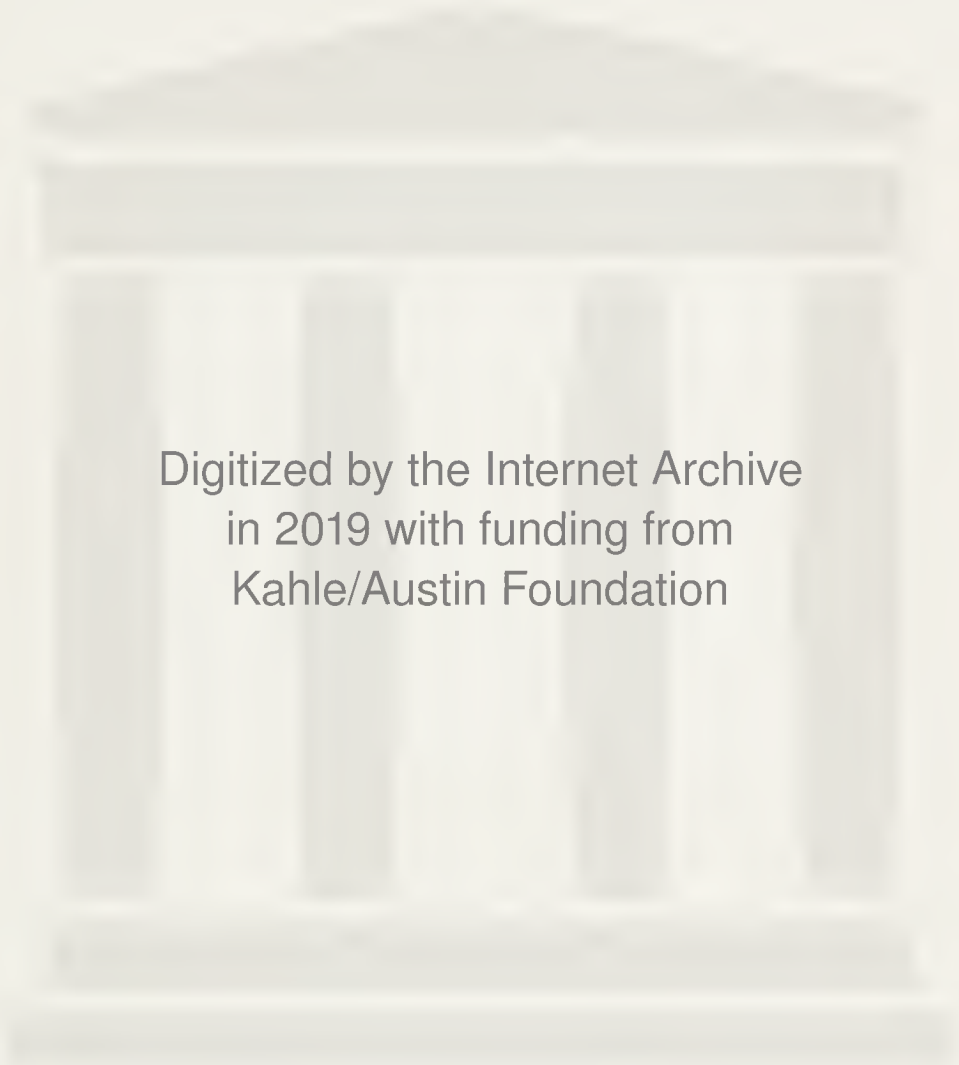


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THE BRITISH YEAR BOOK OF  
INTERNATIONAL LAW













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ARNOLD DUNCAN BARON McNAIR OF GLENIFFER  
1885-1975

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INTERNATIONAL LAW  
1974—1975

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ARNOLD DUNCAN  
LORD McNAIR OF GLENIFFER  
1885–1975

It is fitting that in the present number of the *Year Book* tribute should be paid alike to the memory and to the achievements of the late Lord McNair, whose decease at his Cambridge home, a few weeks after he had reached the age of 90 in March 1975, has once more reduced the ranks of those ‘elder statesmen’—those grand old men—of public international law, already so sadly thinned in recent, or comparatively recent, years by the deaths of, amongst others, Jules Basdevant, James Brierly, Max Huber, Cecil Hurst, Hans Kelsen, Henri Rolin and Charles de Visscher—losses that have hit the British group especially hard since, in addition to Brierly and Hurst, and now McNair, there must be added those of Hersch Lauterpacht, Eric Beckett and Wilfred Jenks—younger in years but mature in achievements, and with much still to give. These losses are particularly saddening from the standpoint of the *Year Book*, for amongst the British bearers of the names involved, there is not one who was not closely connected with it, either as editor, chairman or member of the editorial committee, or contributor, and even in more than one of these capacities. Fortunate indeed is it for the *Year Book* that recent editors and contributors have so ably maintained the high standards of a past that these names will never cease to recall and adorn.<sup>1</sup>

\* \* \*

To devotees of the *Year Book*, Lord McNair’s connection with which was one of the oldest and certainly the most enduring,<sup>2</sup> his career will need no enlarging upon. Over approximately the last thirty years it is writ large, if in nothing else, in his membership and presidency of the International Court of Justice at the Hague and his membership and presidency of the European Court of Human Rights at Strasbourg. (He was indeed a ‘natural’ president of any institution or entity he belonged to, by reason of the confidence he inspired. This was due to his qualities of authority, wisdom, integrity and objectivity, combined with the more human virtues of kindness, understanding and

<sup>1</sup> It may be appropriate also to recall here a number of other names of British international lawyers, contributors to, or otherwise associated with, the *Year Book* between the two wars. In addition to those already mentioned, there were in those early days (listing at random) Erle Richards, Geoffrey Butler, Norman Bentwich, C. M. Picciotto, E. S. Roscoe, E. A. Whittuck, J. M. Spaight, W. R. Bisschop, Lord Finlay, G. G. Phillimore, P. H. Winfield, R. F. Roxburgh, H. H. L. Bellot, P. J. Baker, H. W. Malkin, P. E. Corbett, A. Pearce Higgins, J. W. Garner, A. P. Fachiri, John Fischer Williams, and H. A. Smith (the list is not exhaustive). Of these, and those earlier mentioned, the following were, either singly or jointly, editors up to the time of Lauterpacht (1944): Picciotto, Hurst, Pearce Higgins, Brierly, Fischer Williams and McNair.

<sup>2</sup> McNair first served on the Editorial Committee in 1925, and from then onwards continuously, and was chairman of it from 1959 until about 1972.

accessibility. Moreover he had what all good presidents must have, a talent for administration.) On the world plane it is unquestionably as an international lawyer of eminence that he will be chiefly remembered. To the British jurist, on the other hand, the main significance of his career may well be of a different kind—and in order to understand why, something must be said about his early professional life.

Until he was 40 he was, both by temperament and training, very much an English common-lawyer—except that (and the exception was to have consequences) in the course of graduating in law at Cambridge, he came under the influence of the celebrated romanist W. W. Buckland, with whom later in life he was to write a book about the relationship between the civil and the common law.<sup>1</sup> He thereafter not only retained a fondness and aptitude for quoting appropriate Latin legal maxims, but always took a great interest in the one and only branch of English law that derives, or did derive, its inspiration from the Roman civil (and canon) law, and whose centre was not the Inns of Court but what was known as ‘Doctors’ Commons’—the home of what the Act of 1767, incorporating them, called ‘The College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts’.<sup>2</sup> It was in these Courts that the ‘Doctors’ practised, and it was of course from those Courts—but more particularly on the Admiralty side—that decisions on questions involving public international law, in one form or another, came. Moreover, it was by ‘taking the Opinion of the Doctors’ (as forerunners of the present Law Officers of the Crown) that, in the sixteenth and seventeenth, and in part the eighteenth centuries, the Crown obtained legal advice on international law matters.<sup>3</sup> One can discern in McNair’s interest in all this the origins of one of his major works, the *International Law Opinions*, of which more hereafter.

This digression must be forgiven, for it reveals one of the strands in the process that eventually turned Lord McNair in the direction of international law, for as he was to say, many years later:<sup>4</sup>

I believe that at the time when international law obtained a secure lodgment in Britain, that is to say in the 16th and 17th centuries, it owed that lodgment very largely to the mere fact that it was regarded as being a part of the civil law, that is the universal law of the civilized world . . . . .

‘. . . a part of the civil law . . .’, and therefore also of English law as regards those parts of it that were based on the civil law. This was the point for, as will be seen, another main factor in McNair’s evolution towards international law

<sup>1</sup> *Roman Law and Common Law*; Cambridge University Press, 1936.

<sup>2</sup> When the College was dissolved, consequent upon the passing of the Court of Probate Act, 1857, it was in effect superseded by what became the Probate, Divorce and Admiralty Division of the High Court of Justice. All this was gone into in greater detail by McNair himself in his paper ‘The Debt of International Law in Britain to the Civil Law and the Civilians’, *Transactions of the Grotius Society*, 39 (1953), pp. 183–204.

<sup>3</sup> And as McNair was to say (*loc. cit.* (previous note), pp. 186–7), it was ‘quite possible that the practice of taking the advice of a group of members of this College was due to or influenced by the practice, widespread on the European continent, whereby Courts of Law, and Governments, consulted Universities or Law Faculties upon legal questions’.

<sup>4</sup> *Loc. cit.* (above, n. 2), p. 198.



arose from his interest in certain branches of English law which, in given circumstances, had a direct involvement with topics of public international law.

Nevertheless, so far from manifesting any early interest in the latter field of law, McNair started his professional life, after leaving Cambridge in 1909, by being admitted as a solicitor and practising in London until 1913, after which he returned to Cambridge, being early elected a Fellow of Gonville and Caius, his old College, and later transferring from solicitor to the Bar at which he was able to maintain a London practice in combination with his University duties. At Cambridge he taught a variety of English law subjects—but not, at this time, international law. When the present writer was one of his pupils there, in the period 1921–4, his principal or at least his favourite subject was English contract law, and it always occupied a prominent place amongst his legal concerns, emerging later on the international plane in the shape of one of his most important works: the *Law of Treaties*. It was really during, and in consequence of, the war of 1914–18 that his attention was first attracted to international law as a subject; but it was still very much through the medium of English law that he approached it. The English courts were then being called upon to deal with a number of topics which, though not as such actually new, had not troubled them overmuch since the days of Lord Stowell, Dr. Lushington and Christopher Robinson<sup>1</sup> and which, in the more modern manner in which they were now arising, posed a number of novel and difficult problems concerning the legal effects of war in various connections: its effect on contracts, in the sphere of nationality, private and corporate, on State immunity and the immunity of public ships, questions of enemy character, prize, trading with the enemy, and many others. In the form in which these matters were presenting themselves, the concrete issues they involved were—or were in the immediate sense—issues of English law; still, their international law aspects were obvious, and they could not be decided without reference to these. But although it was thus through the medium of English law that McNair approached, and was first called upon to advise about such questions, he quickly became absorbed by their international law affiliations, and began to write on some of them. This period evoked the articles listed in the footnote below;<sup>2</sup> and all this was eventually brought together under the head of another of his major works the *Legal Effects of War* in its successive editions,<sup>3</sup> and there were later articles in the same or a related vein.<sup>4</sup> A similar process of development must have occurred over the then

<sup>1</sup> All celebrated members of Doctors Commons (see above, p. xii n. 2) in the first half of the nineteenth century. Lord Stowell (Sir William Scot) was characterized by Lord McNair as ‘the greatest of all our civilians’ (loc. cit., above, p. xii n. 2, p. 196).

<sup>2</sup> e.g. ‘War-time Impossibility of Performance of Contract’, *Law Quarterly Review*, 35 (1919), p. 84; ‘Alien Enemy Litigants’, *ibid.*, 31 (1915), p. 154; ‘British Nationality and Alien Status in Time of War’, *ibid.*, 35 (1919), p. 213; ‘Judicial Recognition of States and Governments, and the Immunity of Public Ships’, *this Year Book*, 2 (1921–2), p. 57; ‘International Conduct during the World War’, *Journal of Comparative Legislation and International Law*, 4 (1922), p. 176; and ‘The National Character and Status of Corporations’, *this Year Book*, 4 (1923–4), p. 44.

<sup>3</sup> Cambridge University Press, 1920. Subsequent editions, 1944, 1948, and (with A. D. Watts) 1966.

<sup>4</sup> e.g. ‘Frustration of Contract by War’, *Law Quarterly Review*, 56 (1940), p. 173; ‘The Effect of War upon Contracts’, *Transactions of the Grotius Society*, 27 (1941), p. 182; ‘The Effect of



completely unknown topic of air law—not merely in the form of issues between governments, but of issues between owners, operators or utilizers of aircraft *inter se*, or *vis-à-vis* the general public: questions of negligence, civil and penal liability, etc., as well as of transit and landing rights, territorial rights over suprajacent air, the regime of air-space generally. Problems of internal as well as of international law were involved, many of which arose primarily as issues in the domestic field; but the period also saw the conclusion of the first and basic treaty on the subject, the Paris International Air Navigation Convention of 1919, not to be superseded or much modified until—towards the end of the second world war—the Chicago International Civil Aviation Convention of 1944 was signed.

So far as McNair was concerned this activity resulted in the production of another major work, the *Law of the Air*, first appearing in 1932, the later editions of which, however, he left to others.<sup>1</sup> The order of these various developments, by which he was gradually drawn into the international law field, well illustrates his bent of mind. His was essentially a practical rather than a theoretical approach to law. His interest needed to be aroused by a concrete case or issue. He reasoned from that, inductively, rather than deductively from postulates based on first principles. In this he was typical of much of Anglo-Saxon legal mentality, and that is why (see above) his career as an international lawyer is of such particular interest to the English lawyer, for he brought to the study and practice of international law this same basic attitude and spirit.

If one adds to these considerations the natural prudence and caution that became him as a son of Scotland, it is not surprising to find that, despite his earlier writings on the subject, as already mentioned, it was not until he was over forty that he emerged specifically as an international jurist *de carrière* when, in 1926, he was appointed Reader in Public International Law at the London School of Economics. There followed his editorship of the fourth (1928) edition of *Oppenheim's International Law*, which was the thing that perhaps first established him as a major figure in the field (and even though it has been superseded by several later editions, much more detailed as to fact and citation, and of course more up to date, it remains well worth possessing for much the same reasons as apply to Dana's edition of Wheaton<sup>2</sup>). Yet McNair did not remain above two or three years in the London School of Economics post, preferring to confine himself mainly to Cambridge where, in 1935, he was appointed to one of the foremost of the world's professorships of public international law, the Whewell Chair, in succession to Professor Pearce-Higgins. He was on the verge of bringing out (in 1938) the first edition of another of his major works, the *Law of Treaties*, but gave up the Whewell Chair after only two years<sup>3</sup> when, in 1937, he obtained the Vice-Chancellorship of Liverpool University upon Contracts of Insurance of Property', *Journal of Comparative Legislation and International Law*, 24 (1942), p. 15.

<sup>1</sup> *The Law of the Air* (1932) (later editions, 1953–64, by M. R. E. Kerr, Q.C.; R. A. MacCrindle, Q.C.; and A. H. M. Evans).

<sup>2</sup> *Wheaton's International Law*, 8th ed. by R. H. Dana; London, Sampson Low & Co., 1855.

<sup>3</sup> Being succeeded in that Chair by Professor H. Lauterpacht, as he then was.

sity—a post which was not of course specifically a legal, let alone an international law one at all, but which made him effective head of the whole University<sup>1</sup> and immersed him in mainly administrative work for the next eight years.

The fact is that, although, as the writer of another notice has put it,<sup>2</sup> Lord McNair 'was never deceived about the essential unimportance of what Mark Pattison<sup>3</sup> called "the frippery work of attending boards"', he liked administration, within reason, and in any case was very good at it: 'without seeking power he did in fact have it to a remarkable degree'.<sup>4</sup> Because he was always extremely and beneficently helpful, he also became very influential. From an early date he had been in demand as a member or chairman of public or government committees and boards. The character of these illustrates his versatility,<sup>5</sup> and his participation in them brings out another aspect of his relationship to international law, namely that until quite a late stage, and despite his activities in the field, he remained on the fringes of it considered as a career. This is graphically shown by the fact that when he gave up the Vice-Chancellorship of Liverpool University in 1945 to return to Cambridge, it was not as an international lawyer that he was called upon to do so, but as incumbent designate of the Chair of Comparative Law in succession to Professor Gutteridge—and as incumbent 'designate' only, for he never took up that post, fate, or providence, intervening in the shape of his election to the International Court of Justice in 1946.

\* \* \*

It was perhaps only from this date that McNair became not only first and foremost (as he had long been<sup>6</sup>) an international lawyer, but almost exclusively so. Despite strenuous work at the Hague, where the International Court was much more fully occupied than it has more recently been, he laboured throughout his term of office (1946–55) to complete his two most massive and

<sup>1</sup> In most English Universities, the titular head, the Chancellor, discharges only quasi-honorific functions.

<sup>2</sup> See *per* the present holder of the Whewell Chair, Professor R. Y. Jennings, Q.C., in the *Cambridge Law Journal* for November 1975 (vol. 34, part 2), p. 179.

<sup>3</sup> A well-known mid-Victorian eccentric who was Rector of Lincoln College, Oxford, for 23 years from 1861 to 1884.

<sup>4</sup> Jennings, *loc. cit.* (above, n. 2).

<sup>5</sup> For example, he was Secretary to the Coal Conservation Committee, 1916–18; the Imperial Miners Resources Bureau, 1918–19; and the Sankey Coal Commission, 1919, for which services he received the C.B.E. During the 1939–45 war he was Chairman of the Committee on the Supply and Training of Teachers, of the Palestine Jewish Education Committee, and was a member of the Board of Investigation into Miners' Wages. After the war he was Chairman of the Committee of Inquiry into the Supply of Dentists, and from 1956 to 1958 of the Burnham Committee on Teachers' Salaries.

<sup>6</sup> This can most easily be seen from the articles, additional to those listed at p. xiii, nn. 2 and 4 above, and covering the period up to his election to the International Court, and after, which are either reprinted in his final work, the *Selected Papers* (appearing shortly before his death) or else are listed in Part II of Professor Jennings's *Bibliography* in that work, as not being there reprinted. Of the totality of some sixty articles and papers that these make up, perhaps a dozen appeared in the *British Year Book*, and the rest in such journals as the *Law Quarterly Review*, the *Transactions of the Grotius Society*, the *Cambridge Law Journal*, the *Journal of Comparative Legislation*, and in numerous foreign periodicals, 'Mélanges' and 'Festschriften'.

McNair had also given courses on Treaty Law at the Hague Academy in 1928 and 1933.

important works, intended to be published when he should have left the International Court, as in fact they were, namely the *International Law Opinions* (in three volumes) appearing in 1956, and the second edition of the *Law of Treaties* in 1961, the latter being so expanded in comparison with the earlier 1938 edition as to constitute in effect a new work. In a certain sense the *Treaties* is a constituent part of the *Opinions*, the first edition of it having equally been based mainly on the advice on international law matters given to United Kingdom governments by successive Law Officers of the Crown. For this reason the *Opinions* contains no section on *Treaties*. However, as Professor Jennings says (see p. xv n. 2 above, at p. 180), the 1961 edition of the latter constituted 'a much larger work of a general character' not confined to the material provided by the Law Officers' opinions, yet still retaining enough of its original basis to preserve its status as part of the *Opinions* complex.

A special word must now be said about the *Opinions* itself, because the whole concept and method of execution was highly central to McNair's outlook and to his attitude towards international law. He was a great believer, with regard to any topic or question of international law, in seeking and trying to bring out what he called the 'hard law' of the matter—meaning what was solid, based on something concrete, not speculative—in short, such things as treaty provisions, decided cases, established State practice, clear and substantially unquestioned consensuses of the *opinio juris*, and so forth. Amongst the sources of this 'hard law' he included the English Law Officers' opinions (as indeed he equally would have done the advice given to foreign governments by their official legal advisers). He did so, not because he ascribed any special magic or super-human qualities to such sources, but because he viewed them as an important element in the formation of State practice. Whether the advice given was good or bad,<sup>1</sup> governments tended to *act* upon it—at least as regards the United Kingdom this was the case. If therefore one wanted to find out why the government had acted in a certain manner on some legal issue, or to get at the basic reason for a certain course of practice, one way of doing it—or at least of obtaining considerable light on the subject—was to study the legal opinions on which the actions or practices concerned had been based.

In McNair's selection, these *Opinions*, given to the British Foreign Office, not exclusively (though mainly) by the Law Officers of the Crown,<sup>2</sup> fall principally into the period between 1782 (when the Foreign Office as such first became a separate Department of State<sup>3</sup>) and 1902 (which was, at the time when

<sup>1</sup> In fact, as the present writer has said in his Foreword to Lord McNair's recently published *Selected Papers* (see previous note), these opinions 'if often somewhat oblivious of the finer points of legal theory, are almost invariably informed by a robust common-sense and feeling for what is practicable and viable as law that is characteristic of Lord McNair's own work'.

<sup>2</sup> As McNair mentions in the Preface (vol. 1, p. xvii) the term 'Law Officers' also comprised for his purposes the former King's (or Queen's) Advocate, a 'Civilian' and member of Doctors' Commons, who, from about 1600 until the death of Sir Travers Twiss, Q.C., the last holder of the office, in 1872, was frequently consulted on international law matters, either alone or, later, in association with the Attorney- and Solicitor-General.

<sup>3</sup> At that time and for long afterwards, the Foreign Office, like most other government departments, had no resident Legal Adviser. After the death of Sir Travers Twiss and the abolition of



McNair was writing, the limiting date of the 'open' period for the publication of official records); and as McNair said in his Preface to the *Opinions* (p. xix of vol. 1), they had 'never [previously] been systematically published', and were 'only to be found in the archives of the Foreign Office, whether [those archives were] deposited in the Public Record Office or still retained in the Foreign Office'. It was his conviction that just as in earlier centuries the English civilians or 'Doctors' had indirectly made important contributions to international law through the advice they gave to the Crown,<sup>1</sup> so also had the Law Officers done throughout the nineteenth century and after—and moreover, in a way that was peculiarly attractive to him personally, for although they might often be assisted by persons with specialist knowledge of the subject, the Law Officers themselves were common lawyers and seldom or never, as such, international lawyers. Thus it was that, through the medium of the advice they gave, and the action taken upon it by a (then at all events) leading State and pioneer in the international legal field, common-law concepts entered into and made their mark there. Lord McNair's initiative in bringing this hidden treasure to light had wider repercussions. It became, at least in part, the inspiration of a much larger work, the *British Digest of International Law* based on the Foreign Office archives and papers, and destined to run to some fifteen or more volumes;<sup>2</sup> and of course a number of other countries with a rich international law past have equally opened their archives to the jurist and legal historians for the production of similar kinds of publications.<sup>3</sup>

In the same way the splendid, close on 50-volume series of the *International Law Reports*, the third and fourth volumes of which McNair edited with Lauterpacht<sup>4</sup>—a project always dear to McNair's heart as a common lawyer seeking 'hard law' in the precedents of decided cases—has been followed in England by the *British International Law Cases* in nine volumes.<sup>5</sup>

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This is not the place to do more than barely mention some of Lord McNair's other activities—his membership and presidency (1948–50) of the Institute of

the office of Queen's Advocate (see previous footnote), Sir James Parker-Deane was appointed to assist the Law Officers over Foreign Office matters, but in the mid-1880s this was discontinued and the first resident Legal Adviser to the Foreign Office was appointed in the person of Mr. (later Sir) W. E. Davidson. For a description of how this came about see *Transactions of the Grotius Society*, 39 (1953), pp. 205–6.

<sup>1</sup> See p. xii nn. 2 and 3 above.

<sup>2</sup> Edited by Professor Clive Parry of Downing College, Cambridge, and published by Stevens & Son, London, from 1967 on.

<sup>3</sup> See for instance, for France, A.-C. Kiss's *Répertoire de la pratique française en matière de droit international*, published by the Centre national de la recherche scientifique, Paris, in seven volumes from 1962 on; and, for Italy, *La prassi italiana di diritto internazionale*, in (so far) two volumes, 1861–87, published by Oceana, New York, for the Italian 'Consiglio Nazionale delle Ricerche' from 1970.

<sup>4</sup> The series runs from 1919. McNair, together with Hersch Lauterpacht, was one of its chief inspirers, and a member of the Editorial Committee from the start. But it is above all to Lauterpacht, editor throughout up to volume 24, and sole editor of volumes 5–23, and to his son, E. Lauterpacht, Q.C., editor from volume 24 on, and sole editor of volumes 25 to date, that the chief credit must go.

<sup>5</sup> Published by Stevens/Oceana from 1964 on.

International Law; his position as a Master of the Bench and Treasurer (1947) of Gray's Inn; his University life as a Fellow of Gonville and Caius College, Cambridge, which persisted to the very end; his sparing but always judicious and effective interventions on international law matters in the House of Lords, where he leaves no successor in his field; and his purely private interests, literary and other. But of his judicial activities as a member of the International Court at the Hague, a few words must be said—not more than that, from the present writer, since he has already said something about these in a certain amount of detail elsewhere.<sup>1</sup> One can only wish that McNair had delivered separate judgments more often than he in fact did, for it is by these that he will be chiefly remembered as a judge, and notable most of them are, including two delivered jointly with others.<sup>2</sup> Yet in no fewer than fifteen out of the twenty-three major decisions or advisory opinions given by the International Court during his term, he simply concurred in the findings of the Court without any separate expression of view of his own—a totally different course from that followed by his eminent successor, Sir Hersch Lauterpacht. It was evidently McNair's policy to encourage the Court to act as a cohesive unit as much as possible without undue recourse to individual views—very much in line here with continental practice. He was himself able to abstain from these to the extent that he did, largely because the influence of his great prestige and authority ensured that, as a general rule, the Court would not reach conclusions from which he felt obliged to differ, or else could concur in only on the basis of radically different reasoning. Of McNair therefore it can truly be said that his main contribution to the work of the Court is to be found in the corporate body of that work itself—a fact that can only enhance the value of his comparatively rare statements of separate or dissenting view. His impartiality needs no bush,<sup>3</sup> but can be gauged from the fact that on two important occasions (one of them of a highly emotive kind) he delivered a finding against the United Kingdom.<sup>4</sup>

Of his time on the European Court of Human Rights at Strasbourg, nothing need be said because, apart from the valuable contribution he made as its first President towards setting that Court on its path as a going concern, the system provided for under the European Convention, whereby the Court sits in chambers, the members of which are drawn by lot for each separate case, had the effect that he was able to take virtually no direct part in the substantive, as opposed to the administrative, work of the Court.

<sup>1</sup> See a contribution to the Autumn 1975 number of *The Caiian* (the magazine of Gonville and Caius College, Cambridge) entitled 'Lord McNair and the International Court of Justice'. See also the article on 'Judicial Innovation' in the volume of *Cambridge Essays in Honour of Lord McNair*, Stevens/Oceana, 1966.

<sup>2</sup> The principal ones in order of date, with their I.C.J. Reports references, were the *South-West Africa* advisory opinion (1950 at p. 157); the *Reservations to the Genocide Convention* advisory opinion, with Judges Guerrero, Read and Hsu-mo (1951 at p. 31); the *Anglo-Norwegian Fisheries* case (1951 at p. 158); the two phases of the *Ambatielos* case (1952 at p. 58, and 1953 at p. 25 together with Judges Basdevant, Klaestad and Read); the *Anglo-Iranian Oil Company* case (1952 at p. 116); and the *Monetary Gold* case (1954 at p. 35).

<sup>3</sup> For the non-British reader, this is an expression derived from the fact that a spray of ivy was an old vintners' sign—'good wine needs no bush'.

<sup>4</sup> This was in the *Anglo-Iranian Oil Company* and *Monetary Gold* cases—see ante n. 2.

In the four-year interval between his two judicial posts, McNair reverted to private consultancy work and appeared as counsel or adviser in one or two international arbitrations; and after leaving the Strasbourg Court in 1965, he was appointed President of an Argentine-Chilean Court of Arbitration set up to determine a boundary dispute in the Andes. Its award was given in 1966;<sup>1</sup> and this was his last professional occasion, he being then 81.

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This notice could not close without mention of the profound effect McNair always had on his pupils. His interest in them never flagged, and his prevenience reached out to them unsparingly throughout the years. The present writer is one of many who have but too sad cause to miss it.

G. G. FITZMAURICE

<sup>1</sup> Published as a Foreign Office Blue Book by H.M.S.O. under date of 24 November 1966.





# CUSTOM AS A SOURCE OF INTERNATIONAL LAW\*

By MICHAEL AKEHURST<sup>1</sup>

SAINT Augustine of Hippo wrote in book eleven of his *Confessions*: 'What, then, is time? If no one asks of me, I know; if I wish to explain to him who asks, I know not.' The attitude of international lawyers towards customary international law is somewhat similar; they invoke rules of customary international law every day, but they have great difficulty in agreeing on a definition of customary international law.

For instance, it is agreed that rules of customary international law are created by (or can be inferred from) the practice of States, but what constitutes State practice for this purpose? How frequent, prolonged and widespread must the practice be? How consistent must it be? Does it need to be accompanied by *opinio juris*, and, if so, what exactly is *opinio juris*? These questions, all of which raise very controversial issues, will be considered in turn in the first four sections of this article. The fifth and final section will deal with the relationship between treaties and custom, a problem which involves many of the issues discussed in the first four sections.

## I. WHAT CONSTITUTES STATE PRACTICE?

### *Acts and claims*

In a recent book, Professor D'Amato has adopted a very restrictive definition of the type of acts which are capable of constituting State practice. According to him, only physical acts count; 'a claim is not an act . . . Claims . . . , although they may *articulate* a legal norm,<sup>2</sup> cannot constitute the material component of custom.'<sup>3</sup> He is not alone in his view. In his dissenting opinion in the *Anglo-Norwegian Fisheries* case, Judge Read said: 'Customary international law . . . cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over foreign ships . . . The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over trespassing foreign ships.'<sup>4</sup>

\* © Dr. Michael Akehurst, 1976.

<sup>1</sup> M.A., LL.B. (Cantab.), Docteur de l'Université de Paris; Reader in Law, Keele University.

<sup>2</sup> i.e. they may be evidence of *opinio juris*; see below, p. 35.

<sup>3</sup> D'Amato, *The Concept of Custom in International Law* (1971), p. 88.

<sup>4</sup> *I.C.J. Reports*, 1951, pp. 116, 191. It is not clear whether the Court as a whole agreed with this analysis. The Court said that the Norwegian system of measuring the territorial sea 'was consistently applied by the Norwegian authorities' (pp. 136-7) without clarifying what it meant by 'applied' (the fact that the Court left this point obscure could be interpreted to imply that the Court regarded the distinction between claims and physical acts as unimportant).

But this is a minority view.<sup>1</sup> For instance, arguments between States in diplomatic correspondence or at successive United Nations conferences on the law of the sea concerning the width of the territorial sea or of exclusive fishery zones cite claims made by States (and protests against those claims made by other States), without examining whether or not the claims have been enforced. A similar approach was adopted by ten of the fourteen judges in the *Fisheries Jurisdiction* case.<sup>2</sup> In the *North Sea Continental Shelf* cases the International Court treated the Truman Proclamation and similar claims by other States as State practice which had given rise to a rule of customary law.<sup>3</sup> At the Geneva conference in 1958 opinion was divided on the question whether such claims had already created a rule of customary law, but no State argued that such claims needed to be accompanied by physical acts in order to constitute State practice.<sup>4</sup> In the *Asylum* case the Court seems to have attached equal importance to 'the exercise of diplomatic asylum and . . . the official views expressed on various occasions'.<sup>5</sup> In the *Rights of United States Nationals in Morocco* case, the Court was prepared to look for evidence of custom in diplomatic correspondence<sup>6</sup> and in conference records.<sup>7</sup> Statements made by a State in pleadings before the International Court are liable to be cited against it as authority for customary law in subsequent cases.<sup>8</sup> Moreover, if abstract declarations by States and national laws are capable of creating customary law,<sup>9</sup> there is no reason for denying that claims and other statements made by States in the context of a specific dispute are capable of fulfilling the same function.

D'Amato argues that claims and other statements by States are likely to conflict with one another, and that physical acts do not suffer from this defect.

A State may make certain claims in its diplomatic correspondence, but these often clash with competing claims of other States and thus are not a reliable indicator of the content of international law . . . A State may say many things; it speaks with many

<sup>1</sup> It may be that a claim supported by physical acts carries greater weight than a claim not supported by physical acts, but that is not the same as saying that the latter claim carries no weight at all (cf. below, p. 9, on the application of national laws). The quantity of practice needed to establish a customary rule depends on the quantity of practice which conflicts with the rule; see below, pp. 13-14, 19 and 20.

<sup>2</sup> *I.C.J. Reports*, 1974, pp. 3, 47, 56-8, 81-8, 119-20, 135 and 161. The remaining four judges did not deal with this issue.

<sup>3</sup> *I.C.J. Reports*, 1969, pp. 3, 32-3, 47 and 53.

<sup>4</sup> Slouka, *International Custom and the Continental Shelf* (1968), pp. 90-6. Slouka argues that physical acts can sometimes create a situation in which a State is estopped from challenging an alleged rule of customary law in circumstances where claims or other statements would not have such an effect (compare Judge Gros in the *Nuclear Tests* case, *I.C.J. Reports*, 1974, pp. 253, 285, with the judgment of the International Court in the *Asylum* case, *I.C.J. Reports*, 1950, pp. 266, 278). But, *pace* Slouka, creating an estoppel is not the same as creating customary law. Estoppel requires proof of an act or statement by one's opponent, whereas customary law is binding even on States which have never expressly agreed to it (see below, pp. 23-4).

<sup>5</sup> *I.C.J. Reports*, 1950, pp. 266, 277.

<sup>6</sup> *I.C.J. Reports*, 1952, pp. 176, 200.

<sup>7</sup> *Ibid.*, p. 209. See also the dissenting opinion of Judge Chagla in the *Right of Passage* case, *ibid.*, 1960, pp. 6, 121.

<sup>8</sup> Marek, *Répertoire des décisions et des documents . . . de la C.P.J.I. et de la C.I.J.*, série I, vol. 2 (1967), p. 847 (and see p. 813, where M. Basdevant said that such statements helped to create customary law).

<sup>9</sup> See below, pp. 4-10.

voices, some reflecting divisions within top governmental circles . . . But a State can act in only one way at one time, and its unique actions, recorded in history, speak eloquently and decisively.<sup>1</sup>

However, the physical acts of one State can clash with the physical acts of other States; a State can act in different ways at different times, and different government departments can act in different ways at the same time.<sup>2</sup> Physical acts do not necessarily produce a more consistent picture than claims or other statements do. Moreover, it is artificial to try to distinguish between what a State does and what it says. When one State recognizes another, it often merely says that it recognizes the other State, without performing any physical act; 'recognition is no more than a form of words'.<sup>3</sup>

A further logical defect in D'Amato's theory lies in his view that 'a commitment to act should be included in our list of examples of the quantitative element' of custom.<sup>4</sup> By 'commitment' he means a treaty. And yet, in the light of the *Nuclear Tests* case,<sup>5</sup> a unilateral declaration can sometimes be as binding as a treaty. It would be interesting to know whether D'Amato would regard the declaration made by France in that case as evidence of a new rule of customary law prohibiting nuclear tests in the atmosphere.

Be that as it may, D'Amato's views about the inter-relation between treaties and custom are not likely to be accepted by most international lawyers.<sup>6</sup> A treaty is not a physical act; it is a statement, a promise. What logical justification is there for regarding treaties as State practice, while denying that status to other statements (such as claims) made by States?<sup>7</sup> True, a treaty is binding in international law, and other statements are usually not; but if (as is normally the case) a treaty creates rights and obligations only *inter partes*, there is no justification for attributing greater weight to treaties than to other statements as evidence of the rules of customary law governing the relations of States which are not parties to the treaty. Indeed, in a sense, any statement by a State gives rise to some degree of commitment, even though the commitment is usually political rather than legal; States are reluctant to expose themselves to the accusation of acting inconsistently. Moreover, if the statement has been incorporated in standing instructions to national officials or in a national law, there is a high probability that the State will act in accordance with its previous statement in future cases.<sup>8</sup>

<sup>1</sup> Op. cit. (above, p. 1 n. 3), pp. 50-1.

<sup>2</sup> The problems caused by inconsistencies in State practice are discussed below, pp. 20 et seq.

<sup>3</sup> Parry, *The Sources and Evidences of International Law* (1965), p. 65.

<sup>4</sup> Op. cit. (above, p. 1 n. 3), p. 89.

<sup>5</sup> *I.C.J. Reports*, 1974, pp. 253, 267 et seq.

<sup>6</sup> See below, pp. 42 et seq.

<sup>7</sup> One of the ways in which a treaty can help to create customary law is by asserting claims against non-parties (see below, p. 44); it is inconsistent to regard such a treaty as evidence of customary law while denying that status to claims made unilaterally by one State against another.

<sup>8</sup> It is true that national instructions and national laws can be repealed, but equally a State can be released from its treaty commitments by its treaty partners. Consequently treaties do not necessarily have a higher value than national laws as a basis for predicting how a State will act in the future.



*Statements in abstracto*

Dr. Thirlway's definition of State practice is slightly less restrictive than Professor D'Amato's; he is prepared to accept claims and other statements as State practice, but only if they are made in the context of some concrete situation and not merely *in abstracto*.

. . . the occasion of an act of State practice contributing to the formation of custom must always be some specific dispute or potential dispute.

The mere assertion *in abstracto* of the existence of a legal right or legal rule is not an act of State practice; but it may be adduced as evidence of the acceptance by the State against which it is sought to set up a claim, of the customary rule which is alleged to exist, assuming that that State asserts that it is not bound by the alleged rule. More important, such assertions can be relied on as *supplementary* evidence both of State practice and of the existence of the *opinio juris*;<sup>1</sup> but only as supplementary evidence, and not as one element to be included in the summing up of State practice for the purpose of asserting its generality.

Practice or usage consists of an accumulation of acts which are material or concrete in the sense that they are intended to have an immediate effect on the legal relationships of the State concerned; and acts which are relevant only as assertions in the abstract, such as the recognition by a representative of a State at a diplomatic conference that an alleged rule exists, are not constitutive of practice and thus of custom, but only confirmatory of it.<sup>2</sup>

The distinction between acts which are constitutive of practice and acts which are only confirmatory of it is singularly thin. Indeed, the distinction between assertions made in the context of some concrete situation and assertions made *in abstracto* is also unrealistic, because it emphasizes appearances at the expense of reality. For instance, at a conference on the law of the sea the Arab States and Israel may appear to be making abstract assertions about the right of passage through straits, but it is probable that what they really have in mind is the right of passage through the Straits of Tiran. Conversely, a State may adopt a particular attitude in the context of a particular dispute, not because it has a real interest in the facts of the case, but because it wishes to secure acceptance of a general principle (e.g. Argentina's protests over the kidnapping of Eichmann). Thus assertions about a particular dispute are dressed up as assertions *in abstracto*, and vice versa; it may not even be possible for an outside observer to tell whether this has happened. In short, there is no clear dividing line between the two classes of assertions; they merge into one another.

In the judgments of courts and tribunals, and in the pleadings of States before international courts, there are many examples of government replies to the League of Nations Committee of Experts for the Progressive Codification of International Law being cited as constitutive of State practice, and not merely as confirmatory of it.<sup>3</sup> The States, judges and arbitrators concerned did

<sup>1</sup> Similarly, D'Amato, while denying that such assertions constitute the material component of custom, admits that they may provide evidence of *opinio juris*: D'Amato, *The Concept of Custom in International Law* (1971), pp. 76 and 88.

<sup>2</sup> Thirlway, *International Customary Law and Codification* (1972), p. 58.

<sup>3</sup> Marek, *op. cit.* (above, p. 2 n. 8), pp. 915, 929-30; *Mexican Union Railway claim* (1930),



not regard such replies as being different in kind from claims made in the context of a specific dispute. Indeed, in some cases the replies were cited as the sole evidence of the rule in question.<sup>1</sup>

In the *North Sea Continental Shelf* cases the Netherlands and Denmark argued that the equidistance principle had been created as a rule of customary law by the work of the International Law Commission, by the replies of governments and by the attitudes adopted by States at the Geneva conference. The Court rejected this argument, but only because the equidistance principle had been put forward as *lex ferenda*, not as *lex lata*.<sup>2</sup> The Court did not deny that a rule of customary law could have been created in this way if it had been described as *lex lata* in the relevant discussions. In the *Fisheries Jurisdiction* case the Court cited a resolution passed by the 1958 conference and an amendment tabled at the 1960 conference as State practice which had helped to create a rule of customary law.<sup>3</sup>

The distinction made by the Court in the *North Sea Continental Shelf* cases between assertions of *lex lata* and assertions of *lex ferenda* is extremely important. An assertion that something ought to be the law is obviously not evidence that it is the law; indeed it may even be interpreted as evidence that it is not the law. Of course there is a danger that States may dress up claims for changes in the law as statements of existing law. But it is always open to other States to dispute such statements if they disagree with them. The making of such statements, coupled with the failure of other States to challenge them, may often be regarded as creating a new rule of customary law; the fact that the State making the statement knew that the statement did not reflect pre-existing law does not necessarily prevent the statement from giving rise to a new rule of customary law. But, in this respect, there is nothing unique about such statements. As we shall see later, claims made by States in the context of concrete disputes can give rise to new rules of customary law in the same way as assertions made by States *in abstracto*; all that is needed is that the claim or assertion must be phrased as an assertion of *lex lata* and must be acquiesced in by the other States concerned.<sup>4</sup>

Assertions made *in abstracto* concerning the content of existing law are sometimes found in resolutions passed by the representatives of States at the meetings of international organizations.<sup>5</sup> The importance of such resolutions as a means of developing customary law is well established. The Nuremberg Tribunal

*R.I.A.A.*, vol. 5, pp. 115, 122-4; *Eschauzier* claim (1931), *ibid.*, pp. 207, 210-12; *Mergé* claim (1955), *I.L.R.* 22 (1955), pp. 443, 449-50; *In re Piracy Jure Gentium*, [1934] A.C. 586, 599-600.

<sup>1</sup> e.g., *Mexican Union Railway* claim.

<sup>2</sup> *I.C.J. Reports*, 1969, pp. 3, 38. Cf. Judge Ammoun on pp. 105-6.

<sup>3</sup> *I.C.J. Reports*, 1974, pp. 3, 26.

<sup>4</sup> See below, pp. 36 et seq. But see also pp. 20-2, below, on the effects of lack of uniformity in State practice.

<sup>5</sup> These resolutions are important because they are voted for by representatives of States. The fact that they are passed at meetings of international organizations is of no importance; they would have the same effect if they were passed at an international conference, meeting outside the framework of any international organization.

relied on resolutions passed by the League of Nations Assembly and the Pan-American Conference of 1928, and on unratified treaties, as authority for its finding that aggressive war was criminal according to the 'customs and practices of States' even before the Kellogg-Briand Pact was signed.<sup>1</sup> In *Anglo-Iranian Oil Co. Ltd. v. SUPOR* an Italian court cited a General Assembly resolution as authority for a rule of customary law.<sup>2</sup> In his separate opinion in the *Barcelona Traction* case, Judge Ammoun said: 'the positions taken up by the delegates of States in international organizations and conferences, and in particular in the United Nations, naturally form part of State practice' and 'amount to precedents contributing to the formation of custom'.<sup>3</sup> A similar view was taken by Judge Tanaka in the *South West Africa* cases,<sup>4</sup> and by a number of writers.<sup>5</sup>

Such resolutions are authority for the content of customary law only if they claim to be declaratory of existing law.<sup>6</sup> A clear example is resolution 96(I) of 11 December 1946, which says that 'the General Assembly . . . affirms that genocide is a crime under international law'. But such declaratory language is surprisingly rare. For instance, the language used in the General Assembly resolutions on outer space is much more ambiguous.<sup>7</sup> The preamble to the Charter of Economic Rights and Duties of States declares 'that it is a fundamental purpose of the present Charter to promote the establishment of the new international economic order'; these words, especially the word 'new', negate the idea that the Charter is declaratory of existing law.<sup>8</sup>

It is also necessary to look at the voting figures (since a resolution which purports to be declaratory of customary law but which is opposed by a substantial number of States is obviously weaker evidence of customary law than

<sup>1</sup> Cmd. 6964 (1946), pp. 40-1, followed by the Tokyo Tribunal, I.L.R. 15 (1948), pp. 356, 362-3. *Contra*, Judge Pal (*International Military Tribunal for the Far East: Dissident Judgment of Justice Pal*, Calcutta (1953), pp. 32-70, especially pp. 38 and 56-8).

<sup>2</sup> I.L.R. 22 (1955), pp. 23, 40-1.

<sup>3</sup> *I.C.J. Reports*, 1970, pp. 3, 302-3. He makes no distinction between resolutions dealing with specific disputes and resolutions enunciating rules *in abstracto*. See also the *Genocide* case, *I.C.J. Reports*, 1951, pp. 15, 25-6 and 34-6, and Judge Ammoun's separate opinion in the *Namibia* case, *ibid.*, 1971, pp. 16, 74-5.

<sup>4</sup> *I.C.J. Reports*, 1966, pp. 3, 291-2. *Contra*, Judge van Wyk, pp. 169-70, and possibly Judge Jessup, pp. 432 and 441.

<sup>5</sup> Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), pp. 4-7 and *passim*; Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1966), parts 2 and 3; Castañeda, *Legal Effects of United Nations Resolutions* (1969), chapter 7. See also the writers cited by Judge Ammoun in the *Barcelona Traction* case, *I.C.J. Reports*, 1970, pp. 3, 303.

<sup>6</sup> It is possible that some States will claim that a resolution is declaratory of customary law even though the claim is not supported by the actual wording of the resolution. But obviously such a claim reflects only the views of the States making the claim, and not the views of the other States which voted in favour of the resolution.

<sup>7</sup> Asamoah, *op. cit.* (above, n. 5), part 3, especially pp. 157-8; Darwin, *this Year Book*, 42 (1967), p. 278; Cheng, *Indian Journal of International Law*, 5 (1965), p. 23, especially pp. 40-1; Thirlway, *op. cit.* (above, p. 4 n. 2), pp. 70-1.

<sup>8</sup> General Assembly resolution 3281 (XXIX) of 12 December 1974 (text in *International Legal Materials*, 14 (1975), p. 251). Similar considerations apply to the Declaration on the Establishment of a New International Economic Order (resolution 3202 (S-VI) of 1 May 1974; *ibid.*, 13 (1974), p. 720). See Professor Gillian White, *Virginia Journal of International Law*, 16 (1976), p. 323.

a similar resolution which is passed unanimously<sup>1</sup>) and at the reasons given by States for casting their votes. A State voting in favour of such a resolution must be regarded as accepting that the resolution is declaratory of customary law, in the absence of a statement to the contrary. Conversely, a State voting against the resolution must be regarded as rejecting that view, in the absence of a statement to the contrary. A State which abstains is probably in the same position as a State which votes for the resolution, since it is well established that a State which does not take part in the formation of a rule of general customary law is bound by that rule unless it expressly dissents from an early date.<sup>2</sup> If only part of the resolution claims to be declaratory of customary law, the votes cast in a separate vote (if there is one) on that part of the resolution are a much more reliable indication of the views of States than the vote taken on the resolution as a whole.

A resolution cannot be regarded as declaratory of customary law if it is not phrased in declaratory terms. However, in areas where customary law is uncertain, or viewed by States with dissatisfaction for one reason or another, there is a possibility—but never a certainty—that such a resolution will influence the *future* development of customary law.<sup>3</sup>

It is impossible to study modern international law without taking account of declaratory resolutions and other statements made by States *in abstracto* concerning the content of international law. It is significant that authors who refuse to classify such statements as ingredients of customary law admit them as authority under some other rubric. For instance, D'Amato classifies them as examples of consensus, which he regards as separate from custom and other sources of international law; if there is a consensus among States that something is law, then it *is* law.<sup>4</sup> It is submitted, however, that such an approach is unhelpful and distorting. When States declare that something is *customary* law, it is artificial to classify such a declaration as a statement about something other than customary law. Besides, there is no clear dividing line between statements concerning the content of customary law made by States *in abstracto* and similar statements made in the context of some specific dispute; they merge into one another.<sup>5</sup> The same problems arise in all cases, especially the problem of distinguishing between assertions of *lex lata* and assertions of *lex ferenda*,<sup>6</sup> not to mention the problems which arise whenever one seeks to infer rules of customary law from State practice—how frequent, long, widespread and

<sup>1</sup> See, e.g., *Yearbook of the United Nations* (1961), pp. 30–1, and *American Journal of International Law*, 67 (1973), pp. 329–30, concerning a General Assembly resolution which declared that the use of nuclear weapons was contrary to international law but which was opposed by most western States.

<sup>2</sup> See below, pp. 23–4. On abstentions, see D'Amato, *Canadian Year Book of International Law*, 8 (1970), pp. 104, 114–15, and Virally, *Annuaire français de droit international*, 9 (1963), pp. 508, 539–40. Cf. the *Western Sahara* case, *I.C.J. Reports*, 1975, pp. 12, 23.

<sup>3</sup> See below, pp. 51–2.

<sup>4</sup> D'Amato, 'On Consensus', *Canadian Year Book of International Law*, 8 (1970), p. 104. See also D'Amato, *The Concept of Custom in International Law* (1971), p. 95, and Thirlway, *International Customary Law and Codification* (1972), pp. 68 and 76–7.

<sup>5</sup> See above, pp. 4 and 6 n. 3.

<sup>6</sup> See above, p. 5.



consistent must the practice be? what if different States accept differing rules of customary law? what is meant by *opinio juris*? The problems are the same, regardless of the kind of State practice (including assertions about the content of customary law made by States *in abstracto*) which one is considering; and the solutions to these problems also tend to be the same.

Moreover, there is an important advantage to be gained by regarding statements *in abstracto* as creative of customary law. It is often supposed that the only way to change a customary rule is to break it frequently. There is no doubt that customary rules can be changed in this way, but the process is hardly one to be recommended by anyone who wishes to strengthen the rule of law in international relations. Fortunately there is a way out of the dilemma; as an alternative to changing customary law by breaking it, States can change it by repeatedly declaring that the old rule no longer exists—a much more desirable way of changing the law.

### *National laws and judgments*

Extreme supporters of the theory that custom constitutes an implied agreement between States, such as Strupp, argued at one time that the only relevant State practice is the practice of organs which are competent to make treaties in the name of the State.<sup>1</sup> One effect of this theory would be to exclude consideration of national laws as State practice. Traces of such an approach can be found in some of the individual and dissenting opinions in the *Lotus* case, especially in Judge Nyholm's dissenting opinion: 'There must have been acts of State accomplished in the domain of international relations, whilst mere municipal laws are insufficient.'<sup>2</sup>

But this is very much a minority view. In the *Lotus* case itself, Turkey relied heavily on the laws of various countries.<sup>3</sup> France, instead of arguing that such laws could not be regarded as State practice, maintained that they had not received the assent of other States;<sup>4</sup> and France, in her turn, invoked the laws of various countries as proof of customary law.<sup>5</sup> A similar approach was adopted in previous disputes about criminal jurisdiction. Thus in 1877 the Foreign Office instructed the British Minister at Rio de Janeiro that 'Her Majesty's Government . . . would not be justified' in protesting against a law extending the jurisdiction of Brazilian criminal courts, because the law was similar to the laws of several other countries.<sup>6</sup> In the *Cutting* incident Mexico tried to justify her law by pointing out its similarity to the laws of other countries;<sup>7</sup> the United

<sup>1</sup> Strupp, *Recueil des cours*, 47 (1934), pp. 263, 313–14. See the criticism of Strupp's views by Sørensen, *Les sources du droit international* (1946), pp. 85–94. Presumably D'Amato would exclude national laws unless they have been applied (cf. above, p. 1) and Thirlway would exclude them unless they have been applied or unless they were passed in response to some specific dispute (cf. above, p. 4).

<sup>2</sup> *P.C.I.J.*, Series A, No. 10 (1927), at pp. 59–60. See also the equivocal remarks of Judge Altamira on p. 96. The main judgment of the Court does not seem to share this restrictive approach: pp. 20 and 23.

<sup>3</sup> Marek, *op. cit.* (above p. 2 n. 8), pp. 864, 876 and 888.

<sup>4</sup> *Ibid.*, p. 856.

<sup>5</sup> *Ibid.*, pp. 857 and 887.

<sup>6</sup> McNair, *International Law Opinions* (1956), vol. 2, p. 153.

<sup>7</sup> *Foreign Relations of the United States* (1887), pp. 859–67.



States, instead of arguing that such laws could not be regarded as State practice, sought to show either that they were different from the Mexican law or that they were too few in number to give rise to a rule of customary law.<sup>1</sup> The United States also cited the laws of various countries as proof of customary law.<sup>2</sup>

There have been many cases where national courts have inferred the existence of rules of customary law from a comparison of the laws of different countries, on questions ranging from diplomatic immunity<sup>3</sup> to ships' lights,<sup>4</sup> and the rights of enemy fishing vessels.<sup>5</sup> In the *Nottebohm* case the International Court relied partly on the fact that national laws provide for naturalization only when there is a genuine link.<sup>6</sup> In the *North Sea Continental Shelf* cases some of the judges included national laws or Parliamentary bills among the State practice which could give rise to rules of customary law concerning the continental shelf.<sup>7</sup> Moreover, the International Law Commission and other bodies engaged in codification always treat national laws, regulations and judgments 'as primary evidence of State practice'.<sup>8</sup>

Obviously a law which is frequently applied carries greater weight than a law which is never or seldom applied; any kind of State practice carries greater weight if it involves an element of repetition. But the mere enactment of a law is a form of State practice, even if the law is never applied.<sup>9</sup> However, it may be rash to draw conclusions from an ambiguous law unless one knows how the courts of the State concerned have interpreted it. Similarly, a law which provides, for instance, that prosecutions may be brought against aliens for crimes committed abroad only with the permission of a Minister is inconclusive unless one knows how the Minister exercises his discretion.

The effect of Strupp's theory would be to exclude consideration, not only of national laws, but also of the practice of all departments of the executive which do not have the power to make treaties in the name of the State. This is obviously much too restrictive; for instance, in many countries the admission and expulsion of aliens is handled by the Home Office or its equivalent, not by the Foreign Office or its equivalent, and one would obtain a very incomplete and inaccurate picture of the practice of such countries concerning the admission and expulsion of aliens if one looked only at the practice of the Foreign Office. Strupp's theory also has the effect of refusing to regard national judgments as State

<sup>1</sup> Ibid., pp. 754-5 and 781-817.

<sup>2</sup> Ibid., pp. 770-817.

<sup>3</sup> *Lagos v. Baggianini* (1953), I.L.R. 23 (1955), pp. 533, 537 (Italy).

<sup>4</sup> *The Scotia* (1871), 14 Wallace 170.

<sup>5</sup> *The Paquete Habana* (1900), 175 U.S. 677, 688-700.

<sup>6</sup> *I.C.J. Reports*, 1955, pp. 4, 22. See also the invocation of nationality laws in the *Panevezys-Salutiskis Railway* case: Marek, op. cit. (above, p. 2 n. 8), p. 924.

<sup>7</sup> *I.C.J. Reports*, 1969, pp. 3, 129 (Ammoun), 175 (Tanaka) and 228-9 (Lachs).

<sup>8</sup> Waldock, *Recueil des cours*, 106 (1962), pp. 1, 43. See also *Year Book of the International Law Commission* (1950), vol. 2, pp. 370-1, and Wolfke, *Custom in Present International Law* (1964), pp. 145-7.

<sup>9</sup> This will normally be because there is never any occasion to apply the law. A rather different situation arises if the Courts of the State concerned disregard the law; this suggests either that the practice of the State concerned is inconsistent (cf. below, p. 20) or else that the law in question is void or is no longer in force (in which case it loses its value as State practice).

practice.<sup>1</sup> This may not matter much if one regards judicial decisions as a separate source of international law in their own right, but many international lawyers (including Strupp himself) do not regard judicial decisions as a separate source of international law. Writers like Strupp thus force themselves into the impossible position of trying to study a subject like belligerent rights at sea, while closing their eyes to the judgments of national prize courts.

It is therefore not surprising that Strupp's views are nowadays almost universally discredited. Even Tunkin, who resembles Strupp in regarding custom as an implied agreement between States, includes national laws and judgments as part of State practice.<sup>2</sup>

### Omissions

It is submitted that State practice covers any act or statement by a State from which views can be inferred about international law.<sup>3</sup> It includes not only the types of act or statement which have been discussed in the preceding pages, but also other types of act or statement, such as standing or *ad hoc* instructions by a State to its officials, or criticisms by one State of the conduct of other States,<sup>4</sup> or treaties (including treaties which have not entered into force).<sup>5</sup>

It can also include omissions and silence on the part of States. In the *Lotus* case the Permanent Court held that the absence of prosecutions did not prove the existence of a rule of customary law, but only because the omission had not been accompanied by *opinio juris*; there is a clear inference that omissions accompanied by *opinio juris* can give rise to a rule of customary law.<sup>6</sup> In the *Nottebohm* case the International Court based its decision partly on 'the practice of certain States which refrain from exercising protection'.<sup>7</sup> Most writers include omissions as a form of State practice.<sup>8</sup>

<sup>1</sup> Strupp, *Recueil des cours*, 47 (1934), pp. 263, 314-15. See the classic criticism of Strupp's views by Lauterpacht in this *Year Book*, 10 (1929), p. 65.

<sup>2</sup> Tunkin, *Theory of International Law* (1974), pp. 184-5.

<sup>3</sup> It is sometimes said that a particular type of act or statement is evidence of customary law. This is an ambiguous phrase. It can mean either that the act or statement *is* State practice, or that it is indirect or secondary evidence of State practice, in the same way that the views of writers are indirect or secondary evidence of State practice. Judges have often emphasized that writers record and interpret custom, but do not create it (e.g. *R. v. Keyn* (1876), 2 Ex. D. 63, 202-4). A similar distinction is not made between different types of acts or statements by States (with a few exceptions, already mentioned—see above, pp. 1 (n. 4), 6 (n. 1), 6 (n. 4), 8 (n. 2); all kinds of acts and statements are cited indiscriminately, and there is no shortage of judicial *dicta* recognizing each kind of act or statement as State practice.

<sup>4</sup> See below, pp. 38 et seq.

<sup>5</sup> See below, pp. 42-9.

<sup>6</sup> *P.C.I.J.*, Series A, No. 10 (1927), at p. 28. Judge Altamira dissented on this point, arguing that omissions do not constitute State practice (p. 96).

<sup>7</sup> *I.C.J. Reports*, 1955, pp. 4, 22 (italics added).

<sup>8</sup> Tunkin, *Theory of International Law* (1974), pp. 116-17; and see below, pp. 37-42, on the effects of acquiescence. However, not all writers agree as to the meaning of omission; D'Amato, for instance, regards only physical acts as positive acts, and so classifies purely verbal claims or protests as omissions, which means that he draws from them conclusions which are the opposite of those drawn by other writers (D'Amato, *The Concept of Custom in International Law* (1971), pp. 61-3 and 88-9).

*Practice of international institutions and individuals*

So far we have been considering only the practice of States. It would seem, however, that the practice of international organizations can also create rules of customary law. It is true that most organs of most international organizations are composed of representatives of States, and that their practice is best regarded as the practice of States.<sup>1</sup> But the practice of organs which are not composed of representatives of States, such as the United Nations Secretariat, can also create rules of customary law.<sup>2</sup> In the *Genocide* case, both the judges in the majority and the dissenting judges supported their views by citing the Secretary-General's practice as depositary of treaties and a decision of the Council of the League of Nations.<sup>3</sup> Nor must one overlook the legal opinions of the United Nations Secretariat.<sup>4</sup>

One also needs to take account of the practice of international courts and tribunals—not only their judgments, which may arguably be a separate source of international law in their own right, but also their practice in dealing with incidental matters of evidence and procedure.

It is less certain whether the practice of private individuals can create rules of customary law. Most writers admit that individuals are now capable of holding rights and duties under international law, and there is no *a priori* reason for arguing that the practice of individuals can never create rules of customary law.<sup>5</sup> All the same, there are few, if any, examples of individuals performing this function in fact. International commercial custom on matters like bankers' credits<sup>6</sup> is not public international law, but simply law which is common to many different countries.<sup>7</sup> Again, the practice which grows out of employment contracts concluded by individuals with international organizations<sup>8</sup> is not a good example, since the type of practice which is a source of the law governing employment in international organizations is established unilaterally by the administration, without any need for acquiescence by the staff.<sup>9</sup> Of course, the reactions of States to the acts of individuals (e.g. by prosecuting or failing to prosecute them for assaulting diplomats) can give rise to customary law, but that is not the same as saying that the acts of individuals give rise to customary law. Individuals may form pressure groups to campaign for changes in the law, but the change is made by States and not by individuals. It is arguable that even writers on international law, who exercise more influence on international law than other individuals, have no effect unless or until their views are accepted by States or by international courts.<sup>10</sup>

<sup>1</sup> See above, pp. 5–7, especially, p. 5 n. 5.

<sup>2</sup> Akehurst, *A Modern Introduction to International Law*, second edition (1971), pp. 56–7.

<sup>3</sup> *I.C.J. Reports*, 1951, p. 15, at pp. 25 and 34–6.

<sup>4</sup> Schachter, this *Year Book*, 25 (1948), p. 91.

<sup>5</sup> On the connection between legal personality and the ability to create law, cf. Sereni, *Diritto internazionale*, vol. 1 (1956), p. 117.

<sup>6</sup> Cited by Kopelmanas, this *Year Book*, 18 (1937), pp. 127, 149–50.

<sup>7</sup> On this distinction, see Akehurst, in this *Year Book*, 46 (1972–3), pp. 145, 212–14. See also Rousseau, *Droit international public*, vol. 1 (1970), pp. 328–9.

<sup>8</sup> Cited by McRae, *Canadian Year Book of International Law*, 11 (1973), pp. 87, 99.

<sup>9</sup> Akehurst, *The Law Governing Employment in International Organizations* (1967), p. 95.

<sup>10</sup> See also below, p. 36 n. 7.



## II. QUANTITY OF PRACTICE

*The problem of repetition*

Can a rule of customary law be created by a single act (using 'act' in the wide sense which it has been given in the preceding pages, and including omissions), or is repetition essential? Most writers insist on repetition,<sup>1</sup> although there are exceptions.<sup>2</sup>

Judicial authority is inconclusive. There are many cases where courts have held that a rule of customary law exists because it is supported by abundant practice,<sup>3</sup> but that does not necessarily imply that less abundant practice would have been insufficient to establish the rule.<sup>4</sup> Express statements are frequently made that repeated acts are necessary to give rise to customary law, but most of these statements are *obiter dicta*, because the judges went on to hold that the practice was conflicting<sup>5</sup> or not accompanied by *opinio juris*,<sup>6</sup> or because there was no practice at all supporting the alleged rule,<sup>7</sup> or because the case concerned the use of practice to interpret a treaty and not a genuine customary rule.<sup>8</sup>

A few words should be said in this context about the *North Sea Continental Shelf* cases. Denmark and the Netherlands were able to cite only a very small

<sup>1</sup> See, for instance, Rousseau, *Droit international public*, vol. 1 (1970), p. 317, and Barberis, *Nederlands Tijdschrift voor internationaal recht*, 14 (1967), p. 367. See also the P.C.I.J. pleadings cited in Marek, *op. cit.* (above, p. 2 n. 8), pp. 814, 822, 827-8. Cf. Waldock, *Recueil des cours*, 106 (1962), pp. 1, 44: 'the density of the practice . . . depends on the nature of the case. Some degree of repetition is inherent in the notion of custom, but, where the occasions for acting only arise spasmodically, the density required for the practice will obviously be less'.

At first sight authorities who insist on the passage of time as necessary for the formation of custom (see below, pp. 15-16) may be taken to imply the necessity of repetition, since time and repetition are often two sides of the same coin; but cf. Sørensen, *Les Sources du droit international* (1946), p. 102: 'Lorsque . . . les actes sont de nature à créer un état juridique d'une durée sans limites expresses, le maintien de cet état juridique prend nécessairement la place de la répétition.'

<sup>2</sup> Notably D'Amato, *The Concept of Custom in International Law* (1971), pp. 91-8, and Cheng, *Indian Journal of International Law*, 5 (1965), p. 23. See also Tunkin, *Theory of International Law* (1974), p. 114, and the writers cited by D'Amato, *op. cit.*, pp. 50 and 58.

<sup>3</sup> e.g., the *Wimbledon* case (1923), where the P.C.I.J. rejected an argument which was contrary to a 'consistent international practice': *P.C.I.J.*, Series A, No. 1, p. 25.

<sup>4</sup> On the dangers of arguing *a contrario*, see the *Right of Passage* case, below, p. 15.

<sup>5</sup> *Genocide* case, *I.C.J. Reports*, 1950, pp. 15, 25; *Asylum* case, *ibid.*, pp. 266, 276-7. See also the dissenting opinion of Judge Azevedo in the *Corfu Channel* case, *ibid.*, 1949, pp. 3, 99. Conflicting practice cannot give rise to customary law: see below, p. 20.

<sup>6</sup> Dissenting opinion of Judge Negulesco in the *European Commission of the Danube* case, *P.C.I.J.*, Series B, No. 14, p. 105. It may sometimes be difficult to infer *opinio juris* from a single act. Wolfke, *Custom in Present International Law* (1964), pp. 155-6, argues that the amount of practice needed to establish a custom is less where there is strong evidence of *opinio juris*, just as the requirement of *opinio juris* is partly relaxed where there is abundant practice. See below, p. 36 n. 6, and p. 38 n. 2.

<sup>7</sup> Dissenting opinion of Judge Guggenheim in the *Nottebohm* case, *I.C.J. Reports*, 1955, p. 55. See also the opinion of the Swiss Federal Council, reprinted in *Revue générale de droit international public*, 40 (1969), p. 203.

<sup>8</sup> *Italy-United States Air Transport Arbitration* (1965), *I.L.R.* 45, pp. 393, 419. The practice had been frequent and consistent for six years—an additional reason for regarding as *obiter dicta* the tribunal's remarks about the legal consequences which would have followed if these conditions had not been met.

number of previous examples of delimitation in support of their arguments. The International Court said:

... the Court is not concerned to deny to ... [the cases] cited all evidential value in favour of the thesis of Denmark and the Netherlands. It simply considers that they are inconclusive, and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice, manifested in such circumstances, as would justify the inference that delimitation according to the principle of equidistance amounts to a mandatory rule of customary international law ...<sup>1</sup>

At first sight this might be taken to mean that the cases were insufficient in number to give rise to a rule of customary law. But the Court stressed the absence of *opinio juris*, and pointed out that the cases were of dubious relevance.<sup>2</sup> Moreover, the Court had already held that the relevant rule of customary law, which had started developing as early as 1945, required the continental shelf to be delimited in an equitable manner,<sup>3</sup> and the application of the equidistance principle advocated by Denmark and the Netherlands would, in the circumstances of the case, have given rise to results which the Court regarded as inequitable. In effect, therefore, Denmark and the Netherlands were trying not only to establish a new rule of customary law<sup>4</sup> but also to overthrow the old rule of customary law, and, as we shall see later, the amount of practice needed to establish a new rule which conflicts with the previously accepted rule is much greater than the amount of practice needed to establish a new rule *in vacuo*.<sup>5</sup>

It is submitted that the *Staatsgerichtshof* was correct when it stated *obiter* that it is possible (although very unusual) for a single act to create a rule of customary law.<sup>6</sup>

Much of the evidence of State practice is hidden in unpublished archives. Consequently one can never prove a rule of customary law in an absolute manner but only in a relative manner—one can only prove that the majority of the evidence *available* supports the alleged rule. A State which can cite more precedents than its opponent has a stronger case than its opponent,<sup>7</sup> and in this respect it makes no difference whether the dispute is dealt with by negotiation or brought before an international court. A State which can cite only one or two acts of State practice in support of its case has a better case (other things being equal<sup>8</sup>) than its opponent, if its opponent cannot cite any State practice<sup>9</sup>—just

<sup>1</sup> *I.C.J. Reports*, 1969, pp. 3, 45.

<sup>2</sup> *Ibid.*, pp. 43–5. The cases were ‘inconclusive’ because they were of dubious relevance, not because they were few. Similarly, the Court’s insistence that practice must be ‘extensive and virtually uniform’ (p. 43) was concerned, not with the number of precedents cited, but with the number of participating States and with the absence of inconsistency; see below, p. 17.

<sup>3</sup> *Ibid.*, pp. 33, 35–6, 46 and 47.

<sup>4</sup> Even Denmark and the Netherlands admitted that the equidistance principle was not well established before 1958: *ibid.*, p. 38.

<sup>5</sup> See below, p. 19.

<sup>6</sup> *Lübeck v. Mecklenburg-Schwerin* (1928), cited in Hackworth, *Digest of International Law*, vol. 1 (1940), p. 15. The summary of the case in *Annual Digest*, 4 (1927–8), p. 8, is wrong on this point.

<sup>7</sup> But see below, p. 20, on the effects of inconsistency of practice.

<sup>8</sup> In practice other things are seldom equal; see below, p. 19.

<sup>9</sup> D’Amato, *The Concept of Custom in International Law* (1971), pp. 91–8. This approach has the advantage of avoiding the difficulty of determining the precise quantity of practice needed to establish a rule of customary law in an absolute manner.



as a State which can cite one writer or one judgment in support of its case has a better case than its opponent, if its opponent cannot cite any writers or judgments. One can also invoke the analogy of title to territory, where international courts are often 'satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim'.<sup>1</sup> Proof of customary law, like proof of title to territory, is relative, not absolute. Of course a rule of customary law which is supported by a lot of practice is more firmly established than a rule which is supported by very little practice, in the sense that it is less likely to be overthrown by subsequent changes in practice;<sup>2</sup> but both of them are rules of customary law for the time being, and what will happen to them in the future can never be predicted with certainty.

To some people, the idea of a custom being established by one or two acts is a contradiction in terms. But is it? The nature of custom, like the nature of all legal institutions, varies in accordance with the nature of the society in which it operates. National societies are composed of thousands (often millions) of individuals, who often know very little about one another's doings; in such a society, a large number of acts, spread over a long period of time, are necessary to prove a custom, because it is only in this way that one can prove that the custom has been accepted by the people.<sup>3</sup> International society is different. There are only a hundred and fifty States, and modern methods of publicity, communications and diplomacy make it easy for States to learn what other States are doing. In such an environment a single act, even if it involves only two States, has an impact which an act involving two individuals could almost never have in a national society. Moreover, the development of multilateral treaties, multilateral conferences and international organizations makes it possible for large numbers of States to participate in a single act. The number of States taking part in a practice is much more important than the number of separate acts of which the practice is composed, or the time over which it is spread; a single act involving fifty States provides stronger proof that a custom is accepted by the international community than ten separate acts involving ten separate pairs of States.<sup>4</sup> Thus, in the *North Sea Continental Shelf* cases the International Court envisaged the possibility that 'a very widespread and representative participation in the convention might suffice of itself' to transform the provisions of Article 6 of the Geneva Convention on the Continental Shelf into rules of customary law, 'even without the passage of any considerable period of time'

<sup>1</sup> *Eastern Greenland* case (1933), *P.C.I.J.*, Series A/B, No. 53, p. 46.

<sup>2</sup> See below, p. 19. Note also that a State can opt out of a rule of customary law only during the early stages of the rule's existence (see below, p. 24); for this purpose, but for this purpose only, a distinction must be made between well-established rules and other rules.

<sup>3</sup> In addition, legislators and judges are often jealous of custom as a rival source of law, and try to limit its effectiveness by making it harder to prove custom—something which seldom happens in international law.

<sup>4</sup> Repetition of resolutions of bodies like the General Assembly strengthens a rule of customary law; but a single resolution, even if it is never repeated, may sometimes create such a rule (*pace* Judge Tanaka in the *South West Africa* cases, *I.C.J. Reports*, 1966, pp. 3, 292), provided that there is no practice contradicting the alleged rule. Cf. Bleicher, *American Journal of International Law*, 63 (1969), p. 444.

and apparently without any need of repetition or of subsequent practice of any sort.<sup>1</sup>

### *The problem of time*

In his dissenting opinion in the *European Commission of the Danube* case, Judge Negulesco said that custom required immemorial usage.<sup>2</sup> This *dictum* has been frequently quoted since, although apparently never with approval.

In the *Right of Passage* case the International Court held that a practice lasting for more than 125 years had given rise to a rule of customary law,<sup>3</sup> but did not say or even imply that a shorter period would not have sufficed.

The problem of the time needed to give rise to a rule of customary law has arisen particularly in the context of the continental shelf. In the *Abu Dhabi* case in 1951 the arbitrator held that the doctrine of the continental shelf had not yet become a rule of customary law, but he based his decision on the inconsistency of the practice and not on its novelty.<sup>4</sup> At the Geneva conference in 1958 Greece said that a period of ten years was too short to establish the doctrine as a rule of customary law;<sup>5</sup> but Israel disagreed,<sup>6</sup> and so by implication did the other nineteen States which considered that the doctrine had already become a rule of customary law.<sup>7</sup> In the *North Sea Continental Shelf* cases the International Court said that 'the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law'.<sup>8</sup> In the same case Judge Lachs mentioned 'the freedom of movement into outer space' as an example of a customary rule which had been 'established within a remarkably short period of time'.<sup>9</sup> He might also have mentioned the principle of national sovereignty over air space, which, according to Brierly, arose 'at the moment the 1914 war broke out'.<sup>10</sup>

The heart of the matter is probably that the requirement of time is very much bound up with the requirement of repetition. If many acts are needed to establish a rule of customary law, time will almost certainly also be needed, if only because it is most unlikely that many acts will occur simultaneously. Conversely, if a single act is sufficient to establish a customary rule, the requirement of time falls by the wayside. As a result, much of what was said above about repetition applies equally to time. In particular, the supposed requirement of time, like the supposed requirement of repetition, can usually be dispensed with if there are no precedents which can be cited *against* the alleged rule of customary law.<sup>11</sup>

In the *Lotus* case the Turkish government argued that a custom must be

<sup>1</sup> *I.C.J. Reports*, 1969, pp. 3, 42 (italics added). On the problems raised by this passage of the judgment, see below, pp. 17 and 50.

<sup>2</sup> *P.C.I.J.*, Series B, No. 14 (1927), p. 105.

<sup>3</sup> *I.C.J. Reports*, 1960, pp. 6, 40.

<sup>4</sup> *I.L.R.* 18 (1951), pp. 144, 155.

<sup>5</sup> *United Nations Conference on the Law of the Sea, 1958, Official Records*, vol. 6, p. 6.

<sup>6</sup> *Ibid.*, p. 17.

<sup>7</sup> For details, see Slouka, *International Custom and the Continental Shelf* (1968), pp. 91-3.

<sup>8</sup> *I.C.J. Reports*, 1969, pp. 3, 43. See also pp. 176-9 (Judge Tanaka) and 230 (Judge Lachs).

<sup>9</sup> *Ibid.*, p. 230.

<sup>10</sup> *Yearbook of the International Law Commission* (1950), vol. 1, p. 5.

<sup>11</sup> Cf. above, pp. 13-14. Somewhat different problems arise when a custom spread over a long period of time clashes with a conflicting custom spread over a shorter period of time; see below, p. 19 n. 5, and p. 20.



old enough to express the general consent of the international community.<sup>1</sup> But if that consent can be expressed in other ways, the requirement of time becomes redundant. As Baxter puts it,

the time factor as a separate element in the proof of custom now seems irrelevant. The new customary rule will be established as soon as it acquires the necessary degree of acceptance.<sup>2</sup>

In a national society, time is an essential ingredient of custom because one can prove that a custom is accepted by the people only by pointing to a large number of acts, spread over a long period of time. But in international society there are other ways of proving that a custom is accepted by States; the number of States taking part in an act or acts is more important than the time over which the acts are spread.<sup>3</sup> Time is less important now than it used to be, because improvements in communications enable the actions and reactions of States to be known all over the world more quickly than in the past.<sup>4</sup> Moreover the existence of international organizations gives States more opportunities to make known their views about emergent rules of customary law, and this speeds up the development of these rules.<sup>5</sup>

### *The number of States taking part in a practice*

It has been argued in the preceding pages of this section that a rule of customary law is established if it is accepted by the international community, and that the number of States taking part in a practice is a more important criterion of acceptance than the number of acts of which the practice is composed, and a much more important criterion than the duration of the practice. However, it is difficult to lay down any precise rule about the number of States which must participate in a practice before a rule of customary law can be formed. Participation includes not only the actions of States, but also the reactions of other States whose interests are affected;<sup>6</sup> even so, an action of one State may affect the interests of only one or two other States, and the question arises whether the practice of a small number of States can create a rule of customary international

<sup>1</sup> Marek, *op. cit.* (above, p. 2 n. 8), p. 801. In many cases 'a reasonable period of time must elapse for the reaction of . . . [other] States to be properly manifested': Shihata, *Revue égyptienne de droit international*, 22 (1966), pp. 51, 74, citing Sørensen, *Les sources du droit international* (1946), p. 102.

<sup>2</sup> *Recueil des cours*, 129 (1970), pp. 25, 67.  
<sup>3</sup> Cf. above, p. 14. MacGibbon argues that the time needed to establish a custom in which many States participate is shorter than the time needed to establish a custom in which few States participate: this *Year Book*, 33 (1957), pp. 115, 120 et seq. And see Nelson, *Modern Law Review*, 35 (1972), pp. 52, 54-5.

<sup>4</sup> Wolfke, *Custom in Present International Law* (1964), p. 68 (he also points out that rules on things like spacecraft have to develop quickly in order to keep pace with the growing speed of technological change).

<sup>5</sup> Arangio-Ruiz, *Recueil des cours*, 137 (1972), pp. 419, 484-6.

<sup>6</sup> See below, pp. 37-42, on the significance of protests and acquiescence. Even land-locked States participate in the formation of rules about the width of the territorial sea or of the continental shelf, if their interests are affected by the claims of coastal States (as might happen, for instance, if a land-locked State had a merchant fleet). Similarly, rules about international rivers and canals are created not only by the States in whose territory they lie, but also by other States which want to use them, and rules about spacecraft are created not only by the actions of States which launch them, but also by the reactions of other States over whose territory they pass.

law. Most of the rules of customary law applied by international tribunals have been based on very widespread participation, but such cases are inconclusive on the question whether less widespread participation would have been sufficient to create a rule of customary law.<sup>1</sup>

Some of the older authorities suggest that all States must agree to a rule before it can become a rule of customary law.<sup>2</sup> Other authorities insist only on a general practice, pointing out that Article 38 (1) (b) of the International Court's Statute speaks of a general practice, not of a universal practice.<sup>3</sup>

Even the requirement of general practice can sometimes be a stringent one. In the *North Sea Continental Shelf* cases the Court insisted on 'a very widespread and representative participation'; 'State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform.'<sup>4</sup> But these statements must be seen in their context. The Court was dealing with a contention that a customary rule, corresponding to Article 6 of the Geneva Convention on the Continental Shelf, had 'come into being since the Convention, partly because of its [the Convention's] own impact, partly on the basis of subsequent State practice'; and the Court prefaced its remarks with the warning that 'this result is not lightly to be regarded as having been attained'.<sup>5</sup> If the case had involved, not the transformation of a treaty provision into customary law, but the creation of custom in some other way, it is possible that the Court would not have laid down such a stringent requirement. Moreover, the equidistance principle conflicted with what the Court regarded as the existing rule of customary law on the subject,<sup>6</sup> and the amount of practice which is needed to establish a new rule which conflicts with the previously accepted rule is greater than the amount of practice needed to establish a new rule *in vacuo*.<sup>7</sup>

Judges who insist on rigid rules about the minimum number of States which must participate in a practice seldom agree with one another about the definition of that minimum. Some insist on unanimity.<sup>8</sup> Judge Tanaka thought that a few dissenting States could not prevent the formation of a customary rule, but this implies none the less that a very large majority is required.<sup>9</sup> Judge Ammoun

<sup>1</sup> Cf. the requirement of time in the *Right of Passage* case, above, p. 15.

<sup>2</sup> *Tinoco* case (1923), *R.I.A.A.*, vol. 1, pp. 375, 381. See also the dissenting opinion of Judge Weiss in the *Lotus* case (1927), *P.C.I.J.*, Series A, No. 10, pp. 43-4, and the *P.C.I.J.* pleadings cited by Marek (op. cit., above, p. 2 n. 8), pp. 812, 844 and 876.

<sup>3</sup> Guggenheim, *Traité de droit international public*, vol. 1 (1953), p. 47; Kunz, *American Journal of International Law*, 47 (1953), p. 666; Tunkin, *Theory of International Law* (1974), p. 118; *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, pp. 3, 104 (Judge Ammoun) and 229 (Judge Lachs); *Barcelona Traction* case, *I.C.J. Reports*, 1970, pp. 3, 330 (Judge Ammoun). It may, however, be unwise to place much reliance on the wording of Article 38, the drafting of which is notoriously defective; for instance, practice is evidence of a custom, and not (as Article 38 (1) (b) says) vice versa. Moreover, the wording of Article 38 (1) (b) has not prevented the Court applying regional and bilateral customs; see below, p. 28.

<sup>4</sup> *I.C.J. Reports*, 1969, pp. 3, 42, 43.

<sup>5</sup> *Ibid.*, p. 41. This warning by the Court can also be used to distinguish Judge Read's views in the *Nottebohm* case (*I.C.J. Reports*, 1955, pp. 4, 41) about the Rio Convention and the Bancroft Treaties—views which in any case were not shared by the majority of the Court (*ibid.*, pp. 22-3).

<sup>6</sup> See above, p. 13.

<sup>7</sup> See below, p. 19.

<sup>8</sup> See above, n. 2.

<sup>9</sup> *South West Africa* cases, *I.C.J. Reports*, 1966, pp. 3, 291. Probably the reason why he insisted on a very large majority is that he apparently believed that dissenting States were bound (p. 293);



said that half the States in the world was probably not enough,<sup>1</sup> but this could be taken to mean that not much more than 50 per cent was needed; later he said that the consent of the States of the third world was needed.<sup>2</sup>

It is submitted that all such approaches are misconceived. The number of States needed to create a rule of customary law varies according to the amount of practice which conflicts with the rule. A practice followed by a very small number of States can create a rule of customary law if there is no practice which conflicts with the rule.<sup>3</sup> All of the judicial *dicta* requiring practice by a large number of States have been uttered in cases where practice conflicted,<sup>4</sup> which casts doubt on their relevance to cases where there is no conflicting practice. Moreover, the number of States in the world is now much higher than it was in the nineteenth century and the first half of the twentieth century; many of them have been independent for only a short period of time, with the result that their practice on many topics is non-existent or at least unpublished. To require practice by a high proportion of States in these circumstances is to make the establishment of new customary law an intolerably difficult process.

### *Variables and presumptions*

It has been argued in the preceding pages of this section that, where other things are equal, a very small number of acts, involving very few States and of very limited duration, is sufficient to create a rule of customary law, provided

States are not prepared to accept that a custom followed by 51 per cent of States and rejected by 49 per cent is binding on all States. There is, however, another solution to this problem; if one accepts that a dissenting State is not bound (see below, p. 24), there is comparatively little objection to the view that a custom followed by a small number of States is binding on them *and* on States which express no opinion for or against the custom (i.e. on all States except those who dissent). Dissenting States need one safety valve; they do not need two.

<sup>1</sup> *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, pp. 3, 130 (cf. Judge Lachs on p. 229). Cf. also the dissenting opinion of Judge Loder in the *Lotus* case, *P.C.I.J.*, Series A, No. 10 (1927), p. 34: 'a considerable majority of States'.

<sup>2</sup> *Barcelona Traction* case, *I.C.J. Reports*, 1970, pp. 3, 330. Cf. the view often expressed by Soviet writers that rules of customary law need to be accepted by 'socialist' States as well as by 'capitalist' States. Such views raise more questions than they answer. Must all States in a bloc consent, or only a majority, or only the bloc leaders? How do you tell what bloc a State belongs to? What about States which belong neither to the socialist bloc nor to the capitalist bloc nor to the third world?

<sup>3</sup> Cf. above, pp. 13-14. In the *Asylum* case Colombia contended that the Montevideo Convention of 1933 'merely codified principles which were already recognized by Latin American custom, and that it is valid against Peru as a proof of customary law'. The Court commented: 'The limited number of States which have ratified this Convention reveals the weakness of this argument.' However, weakness is a matter of degree, and even a weak case is better than no case; if matters had rested there, Colombia might have won. But the Court immediately added that Colombia's argument was 'invalidated by the preamble [of the Montevideo Convention] which states that this Convention modifies the Havana Convention' (*I.C.J. Reports*, 1950, pp. 266, 277). See also below, p. 49.

<sup>4</sup> *Tinoco* case (cf. above, p. 17 n. 2); *Lotus* case (cf. the dissenting opinions of Judges Loder and Weiss (*P.C.I.J.*, Series A, No. 10, pp. 34 and 43-4)); *North Sea Continental Shelf* cases (cf. above, p. 17); *South West Africa* cases (cf. above, p. 17 n. 9); *Barcelona Traction* case (*I.C.J. Reports*, 1970, pp. 3, 307, 315-16, 330); *Asylum* case (*I.C.J. Reports*, 1950, pp. 266, 276-7). See also the *P.C.I.J.* pleadings cited by Marek (op. cit., *supra*, p. 2 n. 8), pp. 812-13, 830-1, 844 and 876, and the United States argument in the *Cutting* incident, loc. cit., *supra*, p. 9 at n. 1 and n. 2).



that there is no conflicting practice. But other things are seldom equal. It is inappropriate to talk about a party having the onus of proving customary law,<sup>1</sup> except possibly in the case of local custom,<sup>2</sup> if only because an international tribunal is free to base its decision on authorities which have not been cited by the parties.<sup>3</sup> Nevertheless the fact remains that the quantity of practice needed to create a customary rule is much greater in some circumstances than in others.

In particular, a great quantity of practice is needed to overturn existing rules of customary law.<sup>4</sup> The better established a rule is (i.e. the more frequent, long-standing<sup>5</sup> and widespread the practice which supports it), the greater the quantity of practice needed to overturn it. Conversely, a new rule which differs only slightly from the pre-existing rule can be established more easily than a rule which is radically different from the pre-existing rule.<sup>6</sup>

There is a very strong presumption against change in the law. There are also other presumptions which need to be considered, even though they are not as strong as the presumption against change in the law.<sup>7</sup> There is, for instance, a presumption that rules governing one factual situation should be applied to similar factual situations by way of analogy, and there is a presumption against exceptions to broad principles.<sup>8</sup> It requires a good deal of practice to rebut such a presumption. Moreover such a presumption can be used to provide a solution in a case where there is no practice whatever on the precise point in dispute.

It is a general technique of legal reasoning, and probably of all reasoning, to attach greater weight to close analogies than to distant analogies, and to specific principles than to broad principles. Thus a principle of very great generality, such as the presumption in favour of the liberty of action by States laid down in the *Lotus* case,<sup>9</sup> is not devoid of all value, but will often be overridden by a more specific principle or by a close analogy.<sup>10</sup>

<sup>1</sup> *Fisheries Jurisdiction* case, *I.C.J. Reports*, 1974, pp. 3, 9, 59, 78-9.

<sup>2</sup> *Ibid.*, pp. 78-9; Francioni, *Rivista di diritto internazionale*, 54 (1971), pp. 397, 419-21. See also the *Asylum* case, *I.C.J. Reports*, 1950, pp. 266, 276.

<sup>3</sup> *Lotus* case (1927), *P.C.I.J.*, Series A, No. 10, p. 31. There is probably nothing to forbid a court doing its own research into local custom (*pace* Francioni, *loc. cit.*, previous note), although in practice a court will probably find it easier to do research into general custom than research into local custom.

<sup>4</sup> *Fisheries* case, *I.C.J. Reports*, 1951, pp. 116, 152, *per* Judge Alvarez; *Lotus* case, *P.C.I.J.*, Series A, No. 10, p. 34, *per* Judge Loder.

<sup>5</sup> A rule supported by both old and recent practice is more firmly established than a rule which is supported only by old practice or only by recent practice. A rule which is supported only by old practice is open to the accusation that it does not correspond to modern needs; a rule which is supported only by recent practice runs the risk of disappearing as quickly as it appeared.

<sup>6</sup> Lauterpacht, this *Year Book*, 27 (1950), p. 393; D'Amato, *The Concept of Custom in International Law* (1971), pp. 60-1.

<sup>7</sup> One rather specialized presumption has already been mentioned; transformation of a treaty rule into customary law 'is not lightly to be regarded as having been attained' (see above, p. 17).

<sup>8</sup> *The David* (1933), *Annual Digest*, 7 (1933-4), p. 137; joint dissenting opinion in the first *Admissions* case, *I.C.J. Reports*, 1948, pp. 57, 86. This is probably why there is an onus of proof on a party alleging a local custom (*Asylum* case, *I.C.J. Reports*, 1950, pp. 266, 276), and why prescriptive rights which conflict with normal rules require more time for their establishment than rules of general customary law (cf. MacGibbon, this *Year Book*, 33 (1957), pp. 115, 121 et seq.).

<sup>9</sup> *P.C.I.J.*, Series A, No. 10 (1927), pp. 18, 19 and 21.

<sup>10</sup> This may explain why the presumption in favour of liberty of action is seldom invoked by States (cf. Akehurst, this *Year Book*, 46 (1972-3), pp. 145, 167). The presumption only applies

## III. CONSISTENCY OF PRACTICE

In the *Right of Passage* case the International Court held that a constant and uniform practice had given rise to a rule of customary law.<sup>1</sup> But it would be dangerous to infer from such a statement that inconsistencies in State practice are invariably fatal to the establishment of a customary rule.<sup>2</sup> It is true that in the *Asylum* case the Court found that no customary rule had been established, because the practice was not constant and uniform; but in that case there were major inconsistencies.<sup>3</sup> A small amount of inconsistency does not prevent the establishment of customary rules;<sup>4</sup> practice must be virtually uniform,<sup>5</sup> not absolutely uniform. However, although a small amount of inconsistency does not prevent the creation of a rule, it does have the effect of increasing the amount of practice which is needed to establish the rule.<sup>6</sup>

It is also necessary to consider the time at which inconsistencies occur. In the *Paquete Habana* case the United States Supreme Court found that practice was inconsistent up till 1815, but consistent thereafter; there was thus nothing to prevent the establishment of a customary rule after 1815, even though the existence of the rule before that date was doubtful.<sup>7</sup> Conversely, consistent practice in the past creates a rule which can only be destroyed by abundant modern practice which goes consistently against the rule; if modern practice partly supports the rule and partly goes against it, it is insufficient to destroy the rule. To acts by a State on its own territory; there is a presumption *against* the legality of acts by one State on the territory of another State (*Lotus* case, at pp. 17-19; *Asylum* case, *I.C.J. Reports*, 1950, pp. 266, 274-5). Note also that in the *Lotus* case Turkey was claiming a right to exercise concurrent jurisdiction, not exclusive jurisdiction; when a State claims an exclusive right, it is limiting the liberty of action of other States and therefore cannot rely on a presumption in favour of the liberty of its own action. Thus in a territorial dispute each side argues, in effect, that the other State is under a duty not to exercise sovereignty over the disputed territory. In the Anglo-Norwegian fisheries dispute, Norway argued that the United Kingdom was under a duty not to fish in the disputed waters, while the United Kingdom argued that Norway was under a duty not to molest British trawlers; thus neither side was entitled to invoke the presumption in favour of the liberty of State action.

Contrary to what is sometimes suggested, Turkey derived no advantage from the fact that she appeared as the defendant in the *Lotus* case; the presumption in favour of Turkey's liberty of action would have been exactly the same if, for instance, Turkey had appeared as the plaintiff, seeking a declaration that her action was lawful.

<sup>1</sup> *I.C.J. Reports*, 1960, pp. 6, 40. See also Judge Spender's dissenting opinion (*ibid.*, pp. 99-100), and the *Wimbledon* case, p. 12 n. 3, above.

<sup>2</sup> Cf. the author's comments on another aspect of this case, above, p. 15.

<sup>3</sup> *I.C.J. Reports*, 1950, pp. 266, 276-7. Similar considerations apply to the cases cited above, pp. 12 n. 5, 15 n. 4 and 18 n. 4, as well as to the *Fisheries* case, *I.C.J. Reports*, 1951, pp. 116, 131, and to Judge Krylov's dissenting opinion in the *Corfu Channel* case, *I.C.J. Reports*, 1949, pp. 4, 74.

<sup>4</sup> *Fisheries* case, *I.C.J. Reports*, 1951, pp. 116, 138.

<sup>5</sup> *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, pp. 3, 43. See also Judge McNair's dissenting opinion in the *Fisheries* case, *I.C.J. Reports*, 1951, pp. 116, 168, and Judge Lachs' dissenting opinion in the *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, pp. 3, 229. Cf. Judge Wellington Koo's separate opinion in the *Barcelona Traction* case, *I.C.J. Reports*, 1964, pp. 6, 63: 'There exists always the possibility of a difference of opinion as to the degree of uniformity . . . necessary' to establish a customary rule.

<sup>6</sup> See above, pp. 13-14, 15, 18 and 19.

<sup>7</sup> 175 U.S. 677 (1900). In many cases (but not all), States which originally opposed a majority practice will fall into line with the majority in the course of time.



rule.<sup>1</sup> Practice which is marked by major inconsistencies at all relevant times is self-defeating and cannot give rise to a customary rule.

However, there are various methods of resolving or explaining away inconsistencies so that apparent inconsistency is not always fatal to the establishment of customary law. These methods—some dubious, some sound—will be examined in the remaining pages of this section.

### *Conflicts between different kinds of practice*

A broad definition of what constitutes State practice, such as the definition adopted by the present author,<sup>2</sup> increases the chances that inconsistencies will be found in State practice—inconsistencies which might disappear if a narrower definition of State practice were adopted.<sup>3</sup> It is tempting to argue that some kinds of practice override (or are more important than) other kinds of practice, in the hope of eliminating inconsistencies or at least of reducing them to a low level where they will not prevent the establishment of customary rules. But it is submitted that this approach is unsound and should not be adopted. There is no compelling reason for attaching greater importance to one kind of practice than to another.

It could be argued that the attitude adopted by a State in the context of a specific dispute has a more practical character than a statement *in abstracto*, just as a judgment has a more practical character than an academic opinion. On the other hand, the attitude adopted by a State in the context of a specific dispute may be designed only to further the interests of the State in that particular dispute, without any thought of the way in which such an attitude would affect other disputes; an abstract statement may be less self-seeking and may be based on more mature reflection.<sup>4</sup> Such arguments tend to cancel one another out. Besides, they are over-generalizations which may not be applicable in all cases.

<sup>1</sup> *Asylum case*, *I.C.J. Reports*, 1950, pp. 266, 336, *per* Judge Azevedo, and see below, p. 31. Departures from a practice which provoke protests do not prevent the development of a customary rule: Sørensen, *Les sources du droit international* (1946), p. 103, and see below, pp. 37–42.

Some of the judges in the *Fisheries Jurisdiction* case said that recent practice was too inconsistent to create a rule prohibiting the extension of exclusive fishing zones beyond twelve miles (*I.C.J. Reports*, 1974, pp. 3, 47, 57–9, 86). But clearly such a rule existed at some time in the past, and therefore the inconsistency of recent practice, far from supporting claims of more than twelve miles, is fatal to them (*ibid.*, p. 161, *per* Judge Petráň). Similarly Judge Loder's remarks in the *Lotus case* (*P.C.I.J.*, Series A, No. 10, p. 34) about altering the rules governing criminal jurisdiction beg the question as to what those rules were before modern controversies on the subject arose: see below, p. 31 n. 2.

<sup>2</sup> See above, pp. 1–11.

<sup>3</sup> For instance, General Assembly resolutions declaring the illegality of racial discrimination could, if they stood alone, create a rule of customary law to that effect (see above, pp. 5–7). But a number of States which vote for such resolutions practise racial discrimination in their own territory and this inconsistency prevents the development of a customary rule prohibiting racial discrimination.

<sup>4</sup> The fact that *any* statement by a State is likely to be quoted against it in the future (cf. above, p. 2 n. 8 and p. 4 n. 3) ought to induce States to be cautious in the statements they make about international law; but these are counsels of perfection which are often disregarded in practice.



Similarly, if the Foreign Office of a State follows one practice and the Courts of the State follow another practice, over-generalizations about the greater expertise of the Foreign Office and the greater impartiality of the Courts tend to cancel one another out. Moreover, considerations of expertise and impartiality, which would be relevant if we were comparing the value of different law-determining agencies, are irrelevant in the present context, which concerns a law-creating process;<sup>1</sup> State practice *creates* custom, and the possible bias or ignorance of the individuals constituting the various organs of different States does not prevent the practice of those organs giving rise to rules of customary law, any more than the possible bias or ignorance of Members of Parliament prevent Acts of Parliament being a source of English law (and, be it noted, a source which overrides the rules of common law enunciated by judges who are usually more impartial and more learned than Members of Parliament).<sup>2</sup>

In any case, differences between the practice followed by different organs of a State tend to disappear in time, as the views of one organ prevail over the views of others. From that moment onwards the practice of the State becomes consistent and thus capable of contributing to the development of customary law.

*Is the practice of some States more important than the practice of others?*

It often happens that one practice is followed by some States and a contrary practice is followed by other States. Suggestions are sometimes made that the practice of some States is more important than the practice of other States. The usual purpose of such suggestions is to take advantage of the principle that minor inconsistencies do not prevent the formation of customary law,<sup>3</sup> and to argue that the practice of States which dissent from a particular rule is not sufficiently important to invalidate that rule.

The author has already attacked such suggestions elsewhere,<sup>4</sup> but it is worth adding a few further points. In the first place, such suggestions are made only by academic writers; they are not found in diplomatic correspondence or in the judgments of courts.<sup>5</sup> In the *North Sea Continental Shelf* cases the International Court said that practice must include the practice of States whose interests are specially affected,<sup>6</sup> and that the *absence* of practice by other States did not prevent the creation of a rule of customary law,<sup>7</sup> but that is not the same as saying that the practice followed by the States whose interests were specially affected could give rise to a rule of customary law if a *contrary* practice had been followed by other States.

<sup>1</sup> On the distinction between law-creating processes and law-determining agencies, see Schwarzenberger, *International Law*, third edition (1957), vol. 1, pp. 26-8.

<sup>2</sup> Practice marked by impartiality and expertise is not *intrinsically* more important than other practice; however, there is a chance (but not a certainty) that it will receive more publicity, and will be more widely imitated, than other practice (see below, p. 23, especially n. 2).

<sup>3</sup> See above, p. 20.

<sup>4</sup> Akehurst, *A Modern Introduction to International Law*, second edition (1971), p. 48.

<sup>5</sup> D'Amato, *The Concept of Custom in International Law* (1971), pp. 65-7 and 96-7.

<sup>6</sup> *I.C.J. Reports*, 1969, pp. 3, 42, 43. A less stringent requirement might apply in other cases; see above, p. 17.

<sup>7</sup> *I.C.J. Reports*, 1969, pp. 3, 42, 176, 227, 229.

Of course some States exercise a greater influence on the development of customary law than other States, but that is because the practice of some States is more frequent or better publicized than the practice of other States, not because it is intrinsically more important than the practice of other States. A State whose interests are not affected by a particular issue is likely to contribute little or nothing to the practice on that issue.<sup>1</sup> A State with world-wide interests, which maintains embassies in all other States, will have more opportunities to contribute to the development of rules concerning diplomatic immunities than a small State which can afford to maintain embassies only in two or three other States. The actions of a great power (especially if it publishes digests of its international practice) will probably receive more publicity than the actions of smaller powers, and are therefore more likely to be imitated by other States;<sup>2</sup> but there is no certainty that such imitation will occur, and it is the presence or absence of imitation which affects the future development of customary law, not the fact that the original actions were taken by a great power. Indeed, some small powers may be suspicious of the great powers, and will therefore be more likely to imitate other small powers than to imitate the great powers. This illustrates the weakness of suggestions that the practice of great powers is *invariably* more important than the practice of small powers; such suggestions have obvious attractions for great powers, but their chances of being accepted by other powers are very low.

### *Dissenting States*

A State can be bound by a rule of customary law even if it has never consented to that rule. There is no need to prove that the State is numbered among those States whose practice has given rise to the rule.<sup>3</sup> There are many examples of international and national courts holding that a State is bound by a rule of

<sup>1</sup> Thus in the *North Sea Continental Shelf* cases, it was natural that land-locked States contributed little to the development of customary law concerning lateral delimitation of the continental shelf, because they had little interest in the question (cf. above, p. 22 n. 7). But this argument must be used with caution, because the interests of States are often wider than one might think; see above, p. 16, especially n. 6.

<sup>2</sup> But publicity also depends on chance and on many other factors which have nothing to do with the relative size of the States concerned. For instance, an amusing or outrageous incident may receive disproportionate publicity, and a State which feels strongly about an issue will probably make its grievance heard more effectively than a State which regards an issue as trivial. See also D'Amato, *The Concept of Custom in International Law* (1971), pp. 96-7, for an interesting suggestion that States whose officials and writers have a high degree of sophistication in international law are more likely to be listened to than other States.

Among the many factors which can induce one State to imitate another, one sometimes finds some subtle influences. For instance, when the United States and the United Kingdom made claims in the 1940s to the continental shelf (claims which might have been regarded as contrary to the freedom of the seas), other States quickly imitated those claims; they probably reasoned that the fact that such claims had been made by the two States which were the traditional defenders of the freedom of the seas indicated either that such claims were not really contrary to the freedom of the seas or else that the freedom of the seas was moribund, and they saw no point in being *plus royalistes que le roi*. If the claims had been initiated by the Soviet Union, a State not renowned for its devotion to the freedom of the seas, they would probably not have been imitated so readily.

<sup>3</sup> *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, pp. 3, 28, 130.



customary law, even though the precedents supporting the rule did not involve the State in question.<sup>1</sup>

A State whose practice neither supports nor rejects a rule of customary law is bound by that rule of customary law. However, a State whose practice shows that it rejects the rule is in a different position. Once a rule of customary law has become binding on a State, the State cannot release itself from its obligations unilaterally; the rule remains binding until it is replaced by a new and different rule, and the development of a new rule cannot be achieved unilaterally but requires the participation of other States. The question therefore is whether a State can prevent a rule of customary law becoming binding on it in the first place. The answer appears to be yes, provided that the State opposes the rule in the early days of the rule's existence (or formation) and maintains its opposition consistently thereafter.<sup>2</sup> Opposition which is manifested for the first time after the rule has become firmly established is too late to prevent the State being bound.<sup>3</sup> Conversely, when early opposition is abandoned it loses its effectiveness to prevent the rule becoming binding on the State.

The leading case which supports this view is the *Fisheries* case, where the International Court, after holding that the practice supporting the ten-mile bay rule was not sufficiently consistent to give rise to a rule of customary law, added: '*In any event*, the . . . rule would appear to be inapplicable as against Norway, in as much as she has *always* opposed any attempt to apply it to the Norwegian coast.'<sup>4</sup>

Attempts have been made to interpret this passage in a different sense, but they are not very convincing.

For instance, D'Amato, who believes that general customary law is binding on dissenting States but that special custom<sup>5</sup> is not, suggests that in the passage

<sup>1</sup> For details, see Verdross, *Recueil des cours*, 30 (1929), pp. 275, 296; Basdevant, *ibid.*, 58 (1936), pp. 475, 488-9; D'Amato, *The Concept of Custom in International Law* (1971), p. 190. See also the citation of resolutions of the Pan-American Conference by the Nuremberg Tribunal: Cmd. 6964 (1946), p. 41.

*Contra*, *Lubeck v. Mecklenburg-Schwerin* (1928), cited in Hackworth, *Digest of International Law*, vol. 1 (1940), p. 15, but this case can be distinguished on the grounds that it dealt with a prescriptive right over territory and not with genuine custom.

Statements by some delegates of the Vienna Conference on the Law of Treaties appear to go against the statement in the main text above (*Official Records*, First Session, pp. 197-201, and Second Session, pp. 63-72), but are obviously insufficient to undermine what was a well-established rule before the conference (cf. above, p. 19). Some delegates may have failed to distinguish between a State which has merely not participated in a practice and a State which has actively opposed it, although one cannot explain away the Venezuelan statement on such grounds (*Official Records*, First Session, p. 444, para. 49).

<sup>2</sup> This result can be avoided if the 'new rule' can be presented as an interpretation of an old rule which is binding on the dissenting State. Cf. Judge Jessup's argument in the *South West Africa* cases that General Assembly resolutions condemning apartheid merely interpreted South Africa's obligations under the mandate and imposed no new obligations on South Africa: *I.C.J. Reports*, 1966, pp. 3, 441 (see also Judge Padilla Nervo at pp. 467 et seq.). This process is easier if the rule is couched in very general terms.

<sup>3</sup> That is, unless other States acquiesce. The United Kingdom has for many years considered that the Scandinavian States have a prescriptive right to a four-mile territorial sea, in derogation from the three-mile rule traditionally upheld by the United Kingdom. Historic bays are another example of the same process at work.

<sup>4</sup> *I.C.J. Reports*, 1951, pp. 116, 131 (italics added).

<sup>5</sup> See below, p. 29.



cited the Court was considering whether the ten-mile bay rule was valid as a special custom.<sup>1</sup> But he is forced to admit that the preceding sentences of the Court's judgment deal with the British argument that the ten-mile bay rule was a rule of general customary law; and it is scarcely conceivable that the Court would consider the very different issue of special custom in the next sentence without giving the slightest indication that it was changing the issue under discussion—all the more so since the issue of special custom had not been raised by the pleadings.<sup>2</sup>

Holloway suggests that 'the Court seems to have based its ruling not merely on Norway's refusal to accept the application of an alleged rule of general international law, but on the acquiescence of other States in Norway's practice'.<sup>3</sup> But the Court said nothing about acquiescence by other States in the context of the ten-mile bay rule, although seven pages later it did emphasize the lack of opposition by other States to Norway's general system of delimitation (which raised wider issues than the delimitation of bays).<sup>4</sup> This difference of treatment indicates that the Court did not regard acquiescence by other States as necessary to establish the inapplicability of the ten-mile bay rule to Norway (since Norway had always opposed the rule from an early stage of the rule's existence), but did regard acquiescence as relevant in refuting the British contention that Norway's *general* use of straight base-lines was contrary to rules of international law which were well established long before Norway started using straight base-lines.

Moreover, the present author's views about dissenting States are supported by other judgments<sup>5</sup> and by other writers.<sup>6</sup>

It is true that in the *North Sea Continental Shelf* cases the International Court said that 'customary law rules . . ., by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour'.<sup>7</sup> But the kind of exclusion which the Court apparently had in mind was exclusion occurring some time after the rule had started to

<sup>1</sup> D'Amato, *The Concept of Custom in International Law* (1971), p. 261.

<sup>2</sup> *Fisheries case, Pleadings*, vol. 1, pp. 381 et seq., and vol. 2, pp. 428-9. See also Fitzmaurice, this *Year Book*, 30 (1953), pp. 1, 24-6, and *Recueil des cours*, 92 (1957), pp. 5, 99-100.

<sup>3</sup> Holloway, *Modern Trends in Treaty Law* (1967), pp. 560-1.

<sup>4</sup> *I.C.J. Reports*, 1951, pp. 116, 138.

<sup>5</sup> *Asylum case, I.C.J. Reports*, 1950, pp. 266, 336, *per* Judge Azevedo; *South West Africa cases, I.C.J. Reports*, 1966, pp. 3, 169-70, *per* Judge van Wyk (*contra, semble*, Judge Tanaka, p. 293); *Fisheries Jurisdiction case, I.C.J. Reports*, 1974, pp. 3, 92, *per* Judge de Castro; *North Sea Continental Shelf cases, I.C.J. Reports*, 1969, pp. 3, 229, 232 and 238, *per* Judge Lachs, and p. 247, *per* Judge Sørensen; *The Antelope* (1825), 23 U.S. 66, 122.

<sup>6</sup> Fitzmaurice, this *Year Book*, 30 (1953), pp. 1, 26; Sørensen, *Recueil des cours*, 101 (1960), pp. 1, 45; Lauterpacht, *International Law*, vol. 1 (1970), p. 66; Verzijl, *International Law in Historical Perspective*, vol. 1 (1968), pp. 37-8; Thirlway, *International Customary Law and Codification* (1972), p. 110. Writers who believe that custom is an implied agreement between States (which includes all Soviet writers) go even further than the present author in arguing that a dissenting State is not bound.

*Contra*, Quadri, *Diritto internazionale pubblico*, second edition (1956), p. 93; Francioni, *Rivista di diritto internazionale*, 54 (1971), pp. 397, 416; and probably Kelsen, *Principles of International Law* (1952), pp. 316-17.

<sup>7</sup> *I.C.J. Reports*, 1969, pp. 3, 38.

develop—which, as we have already seen, occurs too late to prevent the rule being binding on the dissenting State (unlike opposition expressed *ab initio*). The Court's *dictum* appears in the section of the judgment dealing with the argument by Denmark and the Netherlands that the development of a customary law rule of delimitation corresponding to Article 6 of the Geneva Convention on the Continental Shelf, which had begun before 1958, had been completed by the signing of that Convention; the Court replied, *inter alia*, that the signing of the Convention could not have had that effect, because the Convention allowed reservations to Article 6.<sup>1</sup> In other words, the fact that States which had not previously objected to the equidistance principle were allowed to exclude its application to them from 1958 onwards showed that the equidistance principle could not have become an established rule of customary law in 1958; if the equidistance principle had become an established rule in 1958, dissent expressed for the first time in or after 1958 would have been too late to prevent the rule being binding on the dissenting States. Dissent expressed during the initial period of a rule's existence, however, is another matter, and one with which the Court did not deal.

If a State were unable to opt out of a developing rule of customary law by dissenting from it *ab initio*, the creation of new rules of customary law would be surrounded by all kinds of logical and practical difficulties. If the dissent of a single State could prevent the creation of a new rule, new rules would hardly ever be created. If a dissenting State could be bound against its will, customary law would in effect be created by a system of majority voting; but it would be impossible to reach agreement about the size of the majority required, and whether (and, if so, how) the 'votes' of different States should be weighted.<sup>2</sup> Moreover, States which were confident of being in a majority would adopt an uncompromising attitude towards the minority. (The absence of majority voting means that rules of customary law are often uncertain; but, when a consensus is reached, one can be fairly certain that it represents a workable compromise which would almost certainly not have been reached by majority voting.)<sup>3</sup>

Recognition of a right of dissent removes these difficulties. Unanimity is not required, nor is any kind of majority. Practice followed even by a small number of States can create new customary rules, provided the practice be consistent.<sup>4</sup> Even inconsistency does not prevent the creation of new customary rules, if it takes the form of some States following one practice and other States following another practice, for in these circumstances it is possible to say that different rules of customary law have come into force among different groups of States.<sup>5</sup> In short, dissent by some States does not prevent the creation of new customary

<sup>1</sup> The Court's views about reservations are open to doubt (see below, p. 48), and this doubt must also extend to the whole process of reasoning by which the Court reached those views.

<sup>2</sup> See above, pp. 22–3, and Akehurst, *A Modern Introduction to International Law*, second edition (1971), p. 48.

<sup>3</sup> This point is developed further by D'Amato, *The Concept of Custom in International Law* (1971), p. 29.

<sup>4</sup> See above, pp. 18 and 20.

<sup>5</sup> See below, pp. 28–31.

rules by other States; it is merely that the dissenting States are not bound by the new rules.

Unless dissenting States are numerous,<sup>1</sup> they seldom maintain their dissent for long. Resolutions passed by large majorities at meetings of international organizations will remind them how isolated they are. The views of writers, in so far as they reflect State practice, will be used to reinforce the opinion of the majority of States and to put pressure on the minority to conform.

Moreover, the practical difficulties which the dissenting States are likely to experience in enforcing their rights may well cause them to change their attitude. An example may make this point clearer. Since 1930 a new customary rule has gradually developed, allowing coastal States exclusive fishing rights for twelve miles (or possibly more) from their shores, and replacing the old rule which limited them to three miles. The United Kingdom dissented from the new rule. In theory the United Kingdom remained entitled to fish in the same areas as before. In practice, however, the United Kingdom found it virtually impossible to enforce its rights (Iceland's disregard of the International Court's judgment in the *Fisheries Jurisdiction* case is a striking example). Meanwhile the seas three miles off the British coast continued to be fished by foreign trawlers, which increased in number as they were excluded from fishing grounds off other States' coasts. The United Kingdom thus suffered all the disadvantages of upholding the three-mile limit, without enjoying any of the advantages in practice—a situation which eventually induced the United Kingdom to claim, with some exceptions, a twelve-mile exclusive fishing zone.

### *New States*

According to traditional theory, new States are bound automatically by all rules of customary law in existence at the time when they become independent.<sup>2</sup> This theory is not accepted by writers (especially writers from Communist countries) who believe that custom is an implied agreement between States and that new States are not bound without their consent.<sup>3</sup> However, such writers are prepared to infer consent from entry into relations with other States unless the new State makes a reservation expressly withholding its consent. This qualification reduces the element of consent to a fiction; but, since such reservations are never made in real life, the practical result is the same as the result produced by the traditional theory. The attitude of the new States of Asia and Africa is somewhat lacking in clarity and consistency. At times they deny that they are bound by certain rules which harm their interests; but they accept other rules without question, as if those rules were binding on them automatically and not solely because the new States had consented to those rules.

The traditional theory is in keeping with what has been said above about

<sup>1</sup> Special problems can arise in this event; see below, pp. 30-1.

<sup>2</sup> *Ware v. Hylton* (1796), 3 U.S. 199, 281; D'Amato, *The Concept of Custom in International Law* (1971), pp. 191-3.

<sup>3</sup> Tunkin, *Droit international public: problèmes théoriques* (1965), p. 87; Bokor-Szegö, *New States and International Law* (1970), chapter 2. See the devastating criticism of such views by Sørensen, *Recueil des cours*, 101 (1960), pp. 1, 46.



dissenting States. A State can 'opt out' of a rule of customary law by dissenting before the rule becomes well established, but not afterwards. Unfortunately for the new States, most rules of customary law were well established before the States concerned became independent; independence came too late for them to dissent effectively.

From a legal point of view the problems caused by the emergence of a hundred new States are the same as the problems caused by the emergence of one.<sup>1</sup> Politically, however, it may be difficult to persuade the new States to accept that they are bound against their will by customs created by old States, if the new States outnumber the old. The resentment felt by the new States in such a situation may be reduced if they realize that they are well placed to *change* the law from within. New customs followed by new States are not binding on old States, but, if the new customs receive a large degree of support, the remaining opposition will eventually disappear—as has already happened in the case of exclusive fishing zones.<sup>2</sup> Even before that happens, the opposition of new States to old customs is bound to cast doubt on the customs; both old States and new States will try to avoid the uncertainties of customary law by entering into treaties to regulate their relationships, and new States, when negotiating such treaties (whether they be multilateral treaties for the codification and progressive development of international law, or *ad hoc* bilateral arrangements), will probably succeed in ensuring that the treaties go at least some way towards meeting their wishes. And the existence of treaties which depart from previously accepted views of customary law serves to undermine those views still further.<sup>3</sup>

### *Regional and special custom*

Customs which differ from those practised by the majority of States can grow up among the States of a particular region. Thus there can be customs peculiar to Latin America<sup>4</sup> or to other regions of the world.<sup>5</sup> In theory at least, there could also be customs existing among groups of States which are linked to one another, not by geographical proximity, but by historical, racial, political, religious or other affinities—for instance, customs common to capitalist countries<sup>6</sup> or to communist countries or to States in the British Commonwealth. Indeed, there is no logical reason why the States concerned need have anything

<sup>1</sup> Fitzmaurice, *International Relations*, 5 (1975), pp. 743, 765–7. *Contra*, S. N. Guha Roy, *American Journal of International Law*, 55 (1961), pp. 863, 881 et seq.

<sup>2</sup> See above, p. 27.

<sup>3</sup> Thirlway, *International Customary Law and Codification* (1972), p. 5; Akehurst, *A Modern Introduction to International Law*, second edition (1971), pp. 35, 39, 50 and 118. And see below, pp. 51–2.

<sup>4</sup> *Asylum case*, *I.C.J. Reports*, 1950, pp. 266, 276–8.

<sup>5</sup> See the decision of the Austrian Supreme Court reported in *International Law Reports*, 38, p. 133 ('the general rules of international law applicable in Continental Europe'), and Judge Ammoun's separate opinion in the *Barcelona Traction* case, *I.C.J. Reports*, 1970, pp. 3, 290–1.

<sup>6</sup> In the *Barcelona Traction* case the International Court held that there was no general custom giving Belgium *locus standi* (*I.C.J. Reports*, 1970, pp. 3, 47). But it is submitted that Judge Gros was right in suggesting that the Court should also have considered whether there was a special custom among capitalist States giving Belgium *locus standi* (*ibid.*, pp. 273–4 and 277; *contra*, Judge Ammoun, at p. 330).

in common apart from the fact that they follow a particular custom;<sup>1</sup> and thus in the *Right of Passage* case the International Court applied a bilateral custom which existed only between India and Portugal.<sup>2</sup> Since the States practising such customs are not necessarily within the same geographical region of the world, 'regional custom' is too narrow a term to describe such customs; it is proposed to use the term 'special custom' to cover regional customs and all other customs which are practised by limited groups of States.

A special custom, by definition, is one which conflicts with general custom.<sup>3</sup> As between the States bound by the special custom, the special custom prevails over the general custom—*lex specialis derogat generali*<sup>4</sup> (unless the general custom is *jus cogens*). As between a State bound by the special custom and a State not so bound, the general custom applies.<sup>5</sup> Even if the State bound by the special custom is not bound by the general custom because it has consistently dissented from the general custom,<sup>6</sup> its relations with the State not bound by the special custom are by definition not governed by the special custom—one cannot apply a custom to a State which is not bound by it. Instead, the relations between the two States are governed by the former general custom which existed before the new general custom came into being.<sup>7</sup>

A general custom is binding, not only on States whose practice created the custom, but also on States whose practice neither supports nor rejects the custom, and on new States which come into being after the custom has become well established—in short, it is binding on all States except those which consistently opposed the custom from its inception. A similar rule cannot apply to a special custom which has grown up among States which have nothing in common except their participation in the custom; in such cases the custom is binding only on the States whose practice supports the custom.<sup>8</sup> However, Thirlway

<sup>1</sup> In the *Asylum* case, *I.C.J. Reports*, 1950, pp. 266, 277–8, the International Court recognized that a custom might exist among all Latin-American States or only among some of them.

<sup>2</sup> *I.C.J. Reports*, 1960, pp. 6, 39.

<sup>3</sup> If a small number of States follow a custom and the practice of other States neither supports nor rejects that custom, that custom is binding on all States; see above, p. 18.

One of the advantages of recognizing the possibility of special customs is that it provides a means of explaining away inconsistencies which would otherwise be fatal to the creation of general custom (cf. above, p. 20). When the different practice followed *inter se* by States in a particular group is kept separate, the remaining practice may be consistent enough to create a general customary rule.

<sup>4</sup> *Right of Passage* case, *I.C.J. Reports*, 1960, pp. 6, 44. See also Osakwe, *American Journal of International Law*, 66 (1972), pp. 596, 597, 599. Sereni, *Diritto internazionale*, vol. 1 (1958), p. 174, argues that a later general custom overrides an earlier special custom. But, in view of the presumption against changes in the law (see above, p. 19), this result would follow only if there were clear evidence that the parties to the special custom were applying the new general custom *inter se* and no longer applying the old special custom.

<sup>5</sup> See the cases cited by Rousseau, *Droit international public*, vol. 1 (1970), pp. 322–3, and by Paul de Visscher, *Recueil des cours*, 136 (1972), pp. 1, 76–7. See also Cohen-Jonathan, *Annuaire français de droit international*, 7 (1961), pp. 119, 133–4, and Judge Alvarez' dissenting opinion in the *Asylum* case, *I.C.J. Reports*, 1950, pp. 266, 293 (although he seems to contradict himself on p. 294).

<sup>6</sup> See above, pp. 23–7.

<sup>7</sup> See above, pp. 23–7, and below, p. 31.

<sup>8</sup> A State can also be bound by virtue of State succession, although this may be limited to customs concerning rights which 'run with the land', as in the *Right of Passage* case, *I.C.J. Reports*, 1960, p. 6.

suggests that a custom which has grown up among some of the States belonging to a well-defined group is binding on all States in that group, except those which consistently opposed the custom from its inception.<sup>1</sup> In some cases there may be difficulty in deciding which States form part of the group. For instance, would a custom existing among certain Spanish-speaking States in South America be binding on the Spanish-speaking States of Central America, or on States like Brazil and Guyana which are situated in South America but which are not Spanish-speaking? However, this is not a decisive reason for rejecting the view outlined above; there are borderline areas on the edge of many rules of law which produce uncertainty, but that does not prevent the rules working satisfactorily in other cases. If, as the author believes, Thirlway's view is correct, it would produce workable results in many cases; for instance, there would be no doubt that a custom existing among some Spanish-speaking States in South America would be binding on all Spanish-speaking States in South America (except those which had consistently opposed it from its inception).

It would certainly be very inconvenient if the rules governing the formation of special custom differed from the rules governing the formation of general custom; one would not know which set of rules to apply in cases where it was uncertain whether the custom under consideration was special or general. Such cases can easily arise. In an international community numbering only 150 States, the difference between a special custom and a general custom is bound to be less clear than it is in a national society consisting of many thousands or even millions of individuals. Where States are divided into two groups of roughly equal size, with one group following one custom and the other following another custom, who can say which is the general custom and which is the special custom? This is a problem with which the classical writers on international law were familiar. For instance, Grotius wrote:

... the law of nations ... has received its obligatory force from the will of all nations, or of many nations. I added 'of many nations' for the reason that, outside of the sphere of the law of nature, which is also frequently called the law of nations, there is hardly any law common to all nations. Not infrequently in fact, in one part of the world there is a law of nations which is not such elsewhere ...<sup>2</sup>

And Vattel wrote that custom might exist among all nations or among some only.<sup>3</sup> The problem may have been lost sight of during the nineteenth and early twentieth centuries, when the international community was small and homogeneous, but in the more heterogeneous international community of today the problem is very much alive. Different States have different views about the expropriation of foreign-owned property and about the width of the territorial sea and of exclusive fishing zones. Is there, in fact, any general custom on such topics,<sup>4</sup> or are there only separate sub-systems of special custom?

<sup>1</sup> Thirlway, *International Customary Law and Codification* (1972), pp. 135-41, citing other writers.

<sup>2</sup> *De iure belli ac pacis*, book 1, chapter 1, s. 14 (1).

<sup>3</sup> *The Law of Nations*, preliminaries, para. 26.

<sup>4</sup> Modern practice is obviously too inconsistent to create a customary rule, although a rule may have been created in the past when practice was more consistent; see above, pp. 20-1.



Recognition of separate sub-systems of special custom provides a solution to problems which might otherwise be almost insoluble. If one rule applies among one half of the international community and another rule applies among the other half, disputes between States in the first group can be settled by applying the first rule and disputes between States in the second group can be settled by applying the second rule; this is obviously more satisfactory than trying to find a general custom common to States in both groups. The difficulty arises when there is a dispute between a State in the first group and a State in the second group. If the States in the first group have always dissented from the custom practised by the States in the second group, and if the States in the second group have always dissented from the custom practised by the States in the first group, then neither group is bound by the custom of the other group. The only solution, unless one is prepared to admit that there are gaps in the law (something which international courts and tribunals have never been willing to do), is to go back in history to a time when a rule accepted by both groups of States did exist, and continue to apply that rule.<sup>1</sup> This approach may seem artificial, since it may involve applying an outdated rule which neither group of States applies in its modern intra-group relations, and its results are likely to be uncertain, since the history of many areas of international law is veiled in obscurity;<sup>2</sup> but it is probably less productive of artificiality and uncertainty than any other solution which might be suggested to what is one of the most difficult problems in international law.

#### IV. *OPINIO JURIS*

##### *The traditional approach*

Practice<sup>3</sup> on its own is not enough to create a rule of customary law; it must be accompanied by evidence of *opinio juris*. The traditional approach to *opinio juris* was well summarized by the International Court in the *North Sea Continental Shelf* cases, where it said that the acts constituting the practice in question

... must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it . . . The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g. in the field of ceremonial and

<sup>1</sup> The same solution must be applied when one group of States continues to apply the old rule and another group of States applies the new rule; see Akehurst, *A Modern Introduction to International Law*, second edition (1971), p. 48, and Tunkin, *Theory of International Law* (1974), p. 125. Cf. above, p. 21, at n. 1.

<sup>2</sup> Verzijl, *International Law in Historical Perspective*, vol. 1 (1968), pp. 400-34. For instance, the universality and passive personality principles of criminal jurisdiction, which are usually regarded by English-speaking States as contrary to international law, are supported by a practice in some continental countries which goes back for centuries and which is probably as old as the English practice of basing jurisdiction on the territorial principle (Akehurst, this *Year Book*, 46 (1972-3), pp. 145, 163). Who can confidently say what (if any) rule of customary law existed before this divergence of practice arose?

<sup>3</sup> Throughout this section, references to practice, conduct, acts or actions include omissions, where appropriate. On the definition of practice generally, see above, pp. 1-11.

protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.<sup>1</sup>

Statements of the same approach are found in other judgments of the Court<sup>2</sup> and of its predecessor, the Permanent Court of International Justice.<sup>3</sup> Moreover, Article 38 (1) (b) of the Court's Statute, by providing that practice must be 'accepted as law', seems to require *opinio juris*, although it leaves the meaning of *opinio juris* uncertain.<sup>4</sup>

However, the traditional approach gives rise to difficulties. It seems to require that States must believe that something is *already* law before it can *become* law. Such a belief is by definition mistaken, and, although such mistakes are possible, they are likely to be rare. It is stretching credulity to suggest that all the many rules of customary law existing today originated on the basis of such mistakes. Moreover, such an approach leaves no room for the *deliberate* creation of new rules to meet new needs, in the future.

It is not surprising, therefore, that various attempts have been made to reformulate the requirement of *opinio juris*, in order to escape from the difficulties caused by the traditional approach.

### *Writers denying or minimizing the need for opinio juris*

The most radical approach is a denial of any requirement of *opinio juris*.<sup>5</sup>

In many cases courts have concluded from an examination of practice that a rule of customary law exists, without requiring or finding any evidence of *opinio juris*.<sup>6</sup> However, such cases may simply represent an elision in judicial reasoning; although there are many cases which do not mention *opinio juris*, there are none which say expressly that it is unnecessary.

Besides, there are many judgments of the Permanent Court of International

<sup>1</sup> *I.C.J. Reports*, 1969, pp. 3, 44.

<sup>2</sup> *Asylum case*, *ibid.*, 1950, pp. 266, 277; *Rights of United States Nationals in Morocco case*, *ibid.*, 1952, pp. 176, 200; *Right of Passage case*, *ibid.*, 1960, pp. 6, 42-3 (see also the individual and dissenting opinions on pp. 63, 82, 90 and 120); Judge Dillard's individual opinion in the *Fisheries Jurisdiction case*, *ibid.*, 1974, pp. 3, 58.

<sup>3</sup> The leading case is the *Lotus case* (1927), *P.C.I.J.*, Series A, No. 10, pp. 28, 60 and 96-7. See also Judge Negulesco's dissenting opinion in the *European Commission of the Danube case* (1927), *P.C.I.J.*, Series B, No. 14, pp. 105-6 and 114.

<sup>4</sup> Article 38 (1) (b) has been cited in support of the view that custom is an implied agreement (Tunkin, *Droit international public: problèmes théoriques* (1965), p. 79) and in support of the theory that custom is merely the discovery of pre-existing natural law (Kunz, *American Journal of International Law*, 47 (1953), pp. 662, 664).

<sup>5</sup> Kelsen and Guggenheim came close to holding this view at one time; see below, p. 33 n. 2. It is sometimes argued that *opinio juris* can be inferred from the frequency or consistency of practice (Séfériades, *Revue générale de droit international public*, 43 (1936), pp. 129, 144; *Asylum case*, *I.C.J. Reports*, 1950, pp. 266, 336, *per* Judge Azevedo, dissenting; Ch. de Visscher, *Theory and Reality in Public International Law* (1957), p. 149 n. 29; Silving, *Iowa Law Review*, 31 (1946), pp. 614, 626). This view is tantamount to denying the need for *opinio juris*, because it eliminates *opinio juris* as a separate requirement for the creation of customary law, additional to the quantitative requirement of practice. See also below, p. 50.

<sup>6</sup> Jenks, *The Prospects of International Adjudication* (1964), pp. 253-8. See also *Fisheries Jurisdiction case*, *I.C.J. Reports*, 1974, pp. 3, 24-6; *Nottebohm case*, *ibid.*, 1955, pp. 4, 21-3; *Lauritzen v. Government of Chile* (1956), *I.L.R.* 23 (1956), pp. 703, 729-31; *Lagos v. Baggianini* (1953), *I.L.R.* 22 (1955), p. 533; and the cases on treaties cited below, p. 43 n. 8.

Justice and of the International Court of Justice affirming the need for *opinio juris*.<sup>1</sup> (These cases are not merely *obiter dicta*: the absence of *opinio juris* was fatal to the French claim in the *Lotus* case, and to the Netherlands and Danish claim in the *North Sea Continental Shelf* cases.) Some writers conclude that the cases conflict, and that the judge has an unfettered discretion to insist on, or dispense with, the requirement of *opinio juris*.<sup>2</sup> But such an approach is useless as a means of *predicting* how the judge will decide a case, nor does it provide any solution for cases which never come to court (such cases are even more frequent in international law than in municipal legal systems, because States are often reluctant to accept the jurisdiction of international courts).<sup>3</sup>

International law, like all legal systems, contains permissive rules as well as rules imposing obligations.<sup>4</sup> If States habitually act in a particular way (e.g. by writing to one another on white paper), is this because international law requires them so to act, or because international law merely permits them so to act? The frequency or consistency of the practice provides no answer to this question; *opinio juris* alone can provide the answer. Moreover, *opinio juris* is also needed in order to distinguish legal obligations from non-legal obligations, such as obligations derived from considerations of morality, courtesy or comity.<sup>5</sup>

If *opinio juris* is abandoned, some other criterion for making such distinctions will be needed to take its place. Most authors who seek to eliminate *opinio juris*, in whole or in part, do not face this problem, although Quadri is an exception. He suggests that the difference between customary law and comity is based on the relative importance of the issue involved—*de minimis non curat lex*.<sup>6</sup> This would explain why there is no rule of law requiring States to use white paper; but it does not explain why the enforcement of foreign judgments, which is

<sup>1</sup> See above, pp. 31–2.

<sup>2</sup> Kelsen, *Revue internationale de la théorie du droit*, 1 (1939), pp. 253, 264–6; Guggenheim, *Traité de droit international public*, first edition, vol. 1 (1953), pp. 46–8. Note that both Kelsen and Guggenheim altered their positions later; see below, p. 34.

<sup>3</sup> Guggenheim spoke of ‘competent organs’, which would presumably include not only courts, but also the political organs of international organizations called upon to decide international disputes. Even so, not all disputes are brought before international organizations, and the problem of knowing how to predict decisions also remains.

Guggenheim suggested two guidelines for his ‘competent organs’—the practice must be constant, and capable of being supported by a sanction. But, as the existence of comity proves, not all constant practice gives rise to rules of customary law. The existence of sanctions is also an unreliable test. Retorsion can follow breach of non-legal rules as well as breach of legal rules; and to say ‘reprisals can be imposed, therefore this is a rule of law’ is an inversion of the normal process of reasoning. ‘La sanzione . . . è . . . la conseguenza che deriva da un preliminare accertamento della giuridicità della regola, non la causa di tale giuridicità’: Francioni, *Rivista di diritto internazionale*, 54 (1971), pp. 397, 408.

<sup>4</sup> See below, pp. 37–8.

<sup>5</sup> The importance of *opinio juris* was not understood until fairly late in the nineteenth century (D’Amato, *The Concept of Custom in International Law* (1971), pp. 47–9; Rousseau, *Droit international public*, vol. 1 (1970), pp. 323–4). Until then, little distinction was made between public international law and rules which were common to the laws of different countries (*jus gentium* in the original Roman sense). But it is now realized that a similarity between the laws of different countries does not, in the absence of *opinio juris*, mean that there is any obligation on States under international law to preserve such a similarity (Rousseau, *op. cit.*, pp. 332–3; Akehurst, this *Year Book*, 46 (1972–3), pp. 145, 212–16 and 225).

<sup>6</sup> *Recueil des cours*, 113 (1964), pp. 237, 328.



important enough to merit the conclusion of treaties, is not important enough to be regulated by customary law.<sup>1</sup> Nor does Quadri's criterion provide any means of distinguishing between permissive rules of law and rules of law imposing duties.

Some authors argue that consistent practice should be regarded as giving rise to a rule of law imposing a duty, in the absence of indications that the practice was not intended to be legally obligatory; instead of looking for *opinio juris*, a court should look for *opinio non-juris*.<sup>2</sup> States do sometimes do things while denying that they are under any legal obligation to do so, as when they pay compensation *ex gratia*.<sup>3</sup> But such disclaimers are often not made. For instance, so far as the present author is aware, no State has ever said that it is *not* under a duty to use white paper for its diplomatic correspondence. A theory which is liable to force us to treat as legally obligatory a practice like that, which we all know instinctively not to be legally obligatory, is obviously unsound.<sup>4</sup>

### *Opinio juris as the consciousness of moral or social needs*

The weakness of the traditional theory of *opinio juris* is that it appears to require that States should regard conduct as obligatory before it can become obligatory. One way round this difficulty has been suggested by a number of writers who define *opinio juris* as a belief that conduct is required by some extra-legal norm; such a belief, coupled with practice, creates a rule of customary law. Thus Le Fur defines *opinio juris* as 'la conviction où sont les États de la nécessité d'observer la règle en question comme étant fondée sur l'idée de justice'.<sup>5</sup> Scelle defines it as 'le sentiment, ou tout au moins l'instinct, d'obéir à une nécessité sociale'.<sup>6</sup> Kelsen, of all people, wrote in 1945 that *opinio juris* is not limited to a belief that conduct is required by law; 'it is sufficient that the States consider themselves bound by any norm whatever'.<sup>7</sup> Thirlway writes that 'the requirement of *opinio juris* is equivalent merely to the need for the practice in question to have been accompanied by either a sense of conforming with the

<sup>1</sup> Akehurst, this *Year Book*, 46 (1972-3), pp. 145, 232-40.

<sup>2</sup> Lauterpacht, *The Development of International Law by the International Court* (1958), p. 380; Guggenheim, *Traité de droit international public*, second edition (1967), pp. 103-5; Judge Sørensen's dissenting opinion in the *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, pp. 3, 246-7.

<sup>3</sup> For other examples, see *British & Foreign State Papers*, vol. 77, p. 940; *Rights of United States Nationals in Morocco*, *I.C.J. Reports*, 1952, pp. 176, 200.

<sup>4</sup> Of course it is possible to turn this argument round the other way, and say that traditional ideas of *opinio juris* are unsound because it is often difficult to find positive indications that States regard as obligatory various practices which all international lawyers know instinctively to be obligatory. But the ease or difficulty of showing that practice is accompanied by *opinio juris* depends partly on one's definition of practice; if abstract statements are included in the concept of practice (see above, pp. 4-8), finding indications of *opinio juris* becomes much easier, because such statements often contain an expression of *opinio juris*.

<sup>5</sup> *Recueil des cours*, 54 (1935), pp. 5, 198. See also the individual opinion of Judge Wellington Koo in the *Right of Passage* case, *I.C.J. Reports*, 1960, pp. 6, 67.

<sup>6</sup> *Recueil des cours*, 46 (1933), pp. 331, 434. See also Kopelmanas, this *Year Book*, 18 (1937), p. 148.

<sup>7</sup> Kelsen, *General Theory of Law and State* (1945), p. 114. Similar views have occasionally appeared in McDougal's thinking: McDougal and others, *Law and Public Order in Space* (1963), p. 117. See, generally, D'Amato, *The Concept of Custom in International Law* (1971), pp. 67-8.

law, or the view that the practice was potentially law, as suited to the needs of the international community . . .<sup>1</sup> Traces of a similar approach can perhaps be discerned in McDougal's emphasis on the part played by reasonableness in the development of customary law.<sup>2</sup>

Of course many customary rules reflect prevailing ideas of justice and social needs, but the overlap is not nearly as complete as the theories mentioned in the previous paragraph would seem to require. Practice accompanied by a sense of moral or social obligation does not always create a rule of customary law. The immorality of aggressive war was recognized centuries before its illegality. Most, if not all, developed countries give aid to poorer countries and would probably admit that they have a moral obligation to do so, but how many of them recognize a legal obligation to give aid? Conversely, there are many illogical distinctions and exceptions in customary law which have grown up for historical reasons, but which cannot be regarded as a response to moral or social needs. Thus, a State is liable for the acts of its political sub-divisions, except for their contractual debts; a neutral State must prevent its nationals supplying warships to a belligerent, but need not prevent them supplying tanks.

The International Court has emphasized that moral considerations do not necessarily produce rules of law. In the *South West Africa* case the Court said:

Throughout this case it has been suggested . . . that humanitarian considerations are sufficient in themselves to generate legal rights and obligations . . . The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form.<sup>3</sup>

Similarly, in the *Haya de la Torre* case the Court drew a distinction between legal obligations and considerations of courtesy and good neighbourliness.<sup>4</sup>

### *D'Amato's theory of articulation*

Professor D'Amato substitutes for *opinio juris* the requirement that the practice in question must be preceded or accompanied by the 'articulation' of a rule of customary law. 'The articulation of a rule of international law . . . in advance of or concurrently with a positive act (or omission) of a State gives a State notice that its action or decision will have legal implications. In other words, given such notice, statesmen will be able freely to decide whether or not to pursue various policies, knowing that their acts may create or modify

<sup>1</sup> Thirlway, *International Customary Law and Codification* (1972), pp. 53-4.

<sup>2</sup> D'Amato, *The Concept of Custom in International Law* (1971), pp. 215-29.

<sup>3</sup> *I.C.J. Reports*, 1966, pp. 3, 34. The case concerned the interpretation of the mandate over South West Africa, but the Court's statement is in sufficiently general terms to apply to the creation of customary law also.

In view of the criticism which the Court's judgment aroused, it is worth pointing out that the Court's dictum about humanitarian considerations is *not* contrary to its advisory opinions on South West Africa, in which it relied, not on abstract moral and humanitarian considerations, but on the purpose of the mandate, as it appeared from the text of the mandate and of the League Covenant.

Of course the Court does not close its eyes totally to humanitarian considerations (*Corfu Channel* case, *I.C.J. Reports*, 1949, pp. 4, 22); it is simply that humanitarian considerations are not *invariably* reflected in rules of law.

<sup>4</sup> *I.C.J. Reports*, 1951, pp. 71, 83.

international law. The absence of prior notification that acts or abstentions have legal consequences is an effective barrier to the extrapolation of legal norms from patterns of conduct that are noticed *ex post facto*.<sup>1</sup> A rule can be articulated by a State, a court, an international organization or a writer, provided it receives sufficient publicity for States to have actual or constructive notice of it.<sup>2</sup>

D'Amato says that 'a single writer or a single State may effectively articulate a new rule of international law', provided that there is no articulation of a conflicting rule; where a conflicting rule has been articulated, the rule which has been articulated more often will prevail.<sup>3</sup> At first sight this echoes his views about the quantity of practice needed to establish a customary rule,<sup>4</sup> but it is open to suspicion. For instance, when Japan adopted the western calendar in 1872, she said she was doing so in response to a duty imposed by international law.<sup>5</sup> So far as the present author is aware, no State has ever articulated the view that the western calendar is permitted but not required by international law; that view has been taken for granted, but never stated expressly. On D'Amato's reasoning, all States which have used the western calendar since 1872 have been confirming a rule of international law making such use obligatory—which is manifestly absurd. In order to establish a rule of customary law requiring particular conduct, it is not necessary to prove that all or even most of the instances of such conduct have been accompanied by acknowledgments of its obligatory character; but the view that such conduct is required (and not merely permitted) does become questionable when the instances of such conduct infinitely outnumber statements that it is obligatory.<sup>6</sup>

### *Statements, not beliefs*

Yet, although D'Amato's theory can be criticized on matters of detail, it does recognize the essential truth that what matters is statements, not beliefs. Practice creates a rule of customary law that particular conduct is obligatory, if it is accompanied by statements on the part of States<sup>7</sup> that such conduct is obligatory.

This is not really very different from the traditional view of *opinio juris*. The traditional view seeks evidence of what States believe; the present author prefers to look for statements of belief by States. The similarity between the two views is worth stressing; the traditional view is open to objections,<sup>8</sup> but

<sup>1</sup> D'Amato, *The Concept of Custom in International Law* (1971), p. 75.

<sup>2</sup> *Ibid.*, pp. 85–7.

<sup>3</sup> *Ibid.*, pp. 76–7.

<sup>4</sup> See above, pp. 13–14.

<sup>5</sup> Jennings, this *Year Book*, 34 (1958), pp. 334, 353.

<sup>6</sup> For this reason the author cannot share the view expressed by Wolfke, *Custom in Present International Law* (1954), pp. 155–6, that the requirement of *opinio juris* becomes progressively less exacting as practice becomes more abundant.

<sup>7</sup> Or on the part of other bodies whose practice is capable of giving rise to customary law (see above, p. 11). However, despite D'Amato's views to the contrary (see above, n. 2), statements by writers that particular conduct is obligatory must be viewed with suspicion if there are no similar statements by States; the practice of individuals, such as writers, cannot normally create customary law. Although the United States Supreme Court relied to some extent on the views of writers as evidence of *opinio juris* in *The Paquete Habana* (1900), 175 U.S. 677, 700–8, it did also find other evidence of *opinio juris* (e.g. the protest by the French government mentioned on p. 692 and the judgments of French courts mentioned on p. 695).

<sup>8</sup> See above, p. 32.



the judicial support for the traditional view is so strong that the traditional view ought not to be modified except to the minimum degree necessary to meet these objections.

The traditional view implies, even if it does not state expressly, that *opinio juris* consists of the *genuine* beliefs of States. It is submitted, however, that a statement by a State about the content of customary law should be taken as *opinio juris* even if the State does not believe in the truth of the statement. It will often be impossible to prove that a State did not believe that its statement was true;<sup>1</sup> however, even if such proof is forthcoming, it does not detract from the value of the statement. For instance, the Truman Proclamation of 1945 claimed that international law gave a coastal State exclusive rights over its continental shelf. It makes no difference whether the United States genuinely believed that international law gave such rights to the coastal State or not; the important thing is that the United States *said* that international law gave such rights to the coastal State, and other States concurred.

This is the main way in which customary law changes. States assert that something is already a rule of international law. Maybe the States concerned have made a genuine mistake, maybe they know that their statements are false—all that is irrelevant. If other States acquiesce, a new rule of customary law comes into being. The practice of States needs to be accompanied by (or consist of) *statements* that something is already law before it can become law; practice does not need to be accompanied by a *genuine belief* that it is already law.<sup>2</sup>

It is important to note, however, that *opinio juris* is to be found in assertions that something is already law, not in statements that it ought to be law, or that it is required by morality, courtesy, comity, social needs, etc. A statement that something is morally obligatory may help to create rules of international morality; it cannot help to create rules of international law.

### *Duties and liberties*

Much of the confusion surrounding the whole topic of *opinio juris* is caused by the assumption made by many authors that all rules of international law are framed in terms of duties. But that is not so; in addition to rules laying down duties, there are rules which give a State a liberty to act in a particular way, without making such conduct obligatory—permissive rules, as the Permanent Court called them in the *Lotus* case.<sup>3</sup> The way in which *opinio juris* can be revealed varies according to the nature of the rule in dispute.

<sup>1</sup> The difficulty of ascertaining the true beliefs of States has been well described by D'Amato, *The Concept of Custom in International Law* (1971), pp. 35–9.

<sup>2</sup> See also Akehurst, *A Modern Introduction to International Law*, second edition (1971), pp. 46–7 and 306; and cf. above, p. 5.

<sup>3</sup> See Dias, *Jurisprudence*, third edition (1970), chapter 9. Liberty on the part of one State need not be coupled with a duty on the part of other States (e.g. concurrent jurisdiction), but sometimes it is; thus, when a State claims an exclusive right over its continental shelf, it is in effect claiming that it is permitted to exploit its continental shelf and that other States are under a duty not to exploit its continental shelf.

The duty/right and liberty/no-right relationships are both *static*. There are also *dynamic* relationships (the power/liability relationship and the immunity/no-power relationship) which are

In the case of a permissive rule, it may be possible to find express statements that States are permitted to act in a particular way. But express statements are not necessary to establish a permissive rule; a claim that States are entitled to act in a particular way can be inferred from the fact that they do act in that way.<sup>1</sup> Claims that States are entitled to act in a particular way, whether they are made expressly or inferred from the conduct of States, must meet with acquiescence (i.e. lack of protests) from other States whose interests are affected, since international law governs the relations between States and not the position of a single State in isolation from other States.<sup>2</sup>

In the case of rules imposing duties, it is not enough to show that States have acted in the manner required by the alleged rule, and that other States have acquiesced in such action. There must be statements by States that they regard such action as obligatory, not voluntary. Such statements may take the form of a declaration *in abstracto* that all States have a duty to act, an acknowledgment by a State that it has a duty to act, or an assertion by a State that another State has a duty to act<sup>3</sup> (such an assertion is usually contained in a protest against action (or a claim to be entitled to act) by the other State which is at variance with the rule in question).

### *Protests and acquiescence*

It will be apparent from what has been said above that protests and acquiescence play a central role in the formation of customary international law.<sup>4</sup>

concerned with the creation, alteration or extinction of legal relationships. Dynamic relationships have seldom been considered by international tribunals; thus the issue in the *Nottebohm* case, which might have been classified as the existence or non-existence of Liechtenstein's *power* to confer its nationality, was analysed by the International Court in terms of Guatemala's alleged *duty* to recognize Nottebohm's Liechtenstein nationality (*I.C.J. Reports*, 1955, pp. 4, 20). *A priori*, it is suggested that a power/liability relationship, like a liberty/no-right relationship, can be inferred from action by one State and acquiescence by another (thus, if State A confers its nationality on X and claims on his behalf against State B, and if State B raises no objections to A's *locus standi*, we can infer that A had power to confer its nationality on X), but that an immunity/no-power relationship (e.g. a limitation on a State's power to confer nationality), like a right/duty relationship, must be evidenced by express statements.

<sup>1</sup> *Nuclear Tests case*, *I.C.J. Reports*, 1974, pp. 253, 305, *per* Judge Petrán. This inference can of course be negated by an express statement; thus, if a State justifies its action as a reprisal, the inference must be that the action would in normal circumstances be illegal.

<sup>2</sup> But if one State claims that it has a right to act and the other State denies that right but permits the first State to act *ex gratia*, the claim will have little authority as a precedent in the future.

If there is no statement claiming or recognizing a right to act, it may be dangerous to infer *opinio juris* from one or two isolated acts; the inference becomes stronger as the acts grow in number. See above, p. 12 n. 6.

<sup>3</sup> But one must also consider how the other State reacts to this claim. If it fails to act, or if it denies that it has a duty to act, the claim will have little authority as a precedent in the future.

The practice of States may remain unchanged, but statements that conduct is obligatory, which accompanied the conduct in the past, may be replaced in time by statements that it is not obligatory, or vice versa. It is in this way that rules of law turn into rules of comity and vice versa. However, such changes cannot be brought about by one group of States against the opposition of another group; cf. above, pp. 18-19 and 20.

<sup>4</sup> See also MacGibbon, this *Year Book*, 33 (1957), p. 115; Suy, *Les actes juridiques unilatéraux en droit international public* (1962), pp. 215-67.

Protest is the opposite of acquiescence, just as a rule that States are under a duty not to do something is the opposite of a permissive rule that they are at liberty to do it. If actions by some States (or claims that they are entitled to act) encounter acquiescence by other States, a permissive rule of international law comes into being; if they encounter protests, the legality of the actions in dispute is, to say the least, doubtful.

The motives of the States concerned are irrelevant. For instance, State A may think that State B's action is contrary to international law but may refrain from protesting because it does not want to jeopardize the conclusion of a trade agreement with State B. Or again, State A may vote for a draft resolution tabled by State B in the General Assembly asserting that something is a rule of international law, not because State A agrees with the statement in the resolution but because it wishes to curry favour with State B. In such cases State A must be treated as if it shared State B's views on the legal issue involved; what counts is what State A says or refrains from saying in public, not what State A secretly believes.<sup>1</sup>

It is always necessary to consider how States react to an act (or claim to be entitled to act) by another State. Consequently acts or claims by one State which other States could not have been expected to know about carry very little weight, and no conclusion can be drawn from failure to protest against such acts or claims.<sup>2</sup>

Protests are not only evidence of *opinio juris*; they also form part of the quantitative element of State practice.<sup>3</sup> When acts or claims by some States encounter protests from other States, the acts (or claims) and protests often cancel each other out, with the result that no rule of customary law comes into being. Thus in the *Fisheries* case Judge Read said: '... it is necessary to rule out seizures made by Norway at and since the commencement of the dispute. They met with immediate protest by the United Kingdom and must therefore be disregarded.'<sup>4</sup>

Protests can themselves create a rule of customary law, but only if the acts or claims protested against are withdrawn or not repeated, if the number of protests greatly outnumbers the acts or claims protested against, or if the States protesting greatly outnumber the States responsible for the acts or claims in dispute—otherwise practice is too inconsistent to give rise to a customary rule. A small amount of inconsistency does not prevent a rule of customary law coming into existence, but a large amount does.<sup>5</sup>

In determining the relative weight to be attached to acts or claims and to protests against such acts or claims, it is necessary to take into account 'the number of protests, the vehemence of the protests, the subsequent actions of

<sup>1</sup> It is possible that the position adopted by State A would have no legal effects if State A had been intimidated by the threat or use of force by State B, or if its officials had been bribed or coerced by State B (by analogy from the rules governing nullity of treaties). But these are extreme cases which are unlikely to happen often in practice.

<sup>2</sup> In the *Fisheries* case the Court emphasized that the United Kingdom must have known of the Norwegian system of baselines: *I.C.J. Reports*, 1951, pp. 116, 138-9.

<sup>3</sup> See above, p. 10.

<sup>4</sup> *I.C.J. Reports*, 1951, pp. 116, 191.

<sup>5</sup> See above, p. 20.



the parties, the importance of the interests affected and the effluxion of time'.<sup>1</sup> Thus isolated protests in the face of repeated claims are probably insufficient to prevent the growth of a customary rule based on such claims. On the other hand, isolated acts or claims which conflict with a well-established rule of international law are insufficient to create a contrary rule,<sup>2</sup> and so, strictly speaking, it is unnecessary to protest against such acts or claims in order to deprive them of their law-creating effect, since they have no law-creating effect in the first place.<sup>3</sup>

The number and vehemence of the protests needed to create a customary rule (or to prevent acts and claims creating a contrary rule) vary according to the extent to which the acts or claims affect the interests of other States. If an act affects the interests of only one State, protest by that State will carry great weight; if it affects the interests of many States, protests by a small number of those States will carry little weight. No hard and fast line can be drawn between States whose interests are affected and States whose interests are not affected; rather, the interests of different States are affected to varying degrees, and acquiescence by a State whose interests are greatly affected is more significant than acquiescence by a State whose interests are only slightly affected.<sup>4</sup>

The extent to which a State's interests are affected varies according to the nature of the act concerned. Failure to protest against an assertion *in abstracto* about the content of customary law is less significant than failure to protest against concrete action taken by a State in a specific case which has an immediate impact on the interests of another State. Failure to protest against the enactment of a law is less significant than failure to protest against its application. Even so, failure to protest against the enactment of a law does have some significance;<sup>5</sup> the fact that States often protest against the enactment of laws<sup>6</sup> suggests that States believe that such protests have some value, and in the *Lotus* case the Permanent Court emphasized that the enactment of laws claiming jurisdiction under the objective territorial principle had not provoked protests from other States.<sup>7</sup>

The view that protests form part of the quantitative element of State practice has been challenged by D'Amato. According to him, a protest can articulate a rule of international law,<sup>8</sup> but it cannot be cited as part of the quantitative element of State practice. Consequently protests are not enough to prevent a new rule of customary law arising from other States' physical acts. The precedent-creating effect of such physical acts can only be nullified by contrary physical acts on the part of States which are aggrieved by the physical acts of other States.<sup>9</sup>

<sup>1</sup> O'Connell, this *Year Book*, 45 (1971), pp. 1, 63.

<sup>2</sup> See above, p. 19.

<sup>3</sup> Cf. Lauterpacht, this *Year Book*, 27 (1950), pp. 376, 397-8.

<sup>4</sup> Cf. *Fisheries Jurisdiction* case, *I.C.J. Reports*, 1974, pp. 3, 58, *per* Judge Dillard.

<sup>5</sup> Despite Judge Loder's statement to the contrary in the *Lotus* case (1927), *P.C.I.J.*, Series A, No. 10, p. 34.

<sup>6</sup> MacGibbon, this *Year Book*, 30 (1953), pp. 293, 299-305; Wortley, *Expropriation in International Law* (1959), pp. 72, 74-5. Cf. McNair, *International Law Opinions* (1956), vol. 2, p. 153.

<sup>7</sup> *P.C.I.J.*, Series A, No. 10, p. 23.

<sup>8</sup> D'Amato, *The Concept of Custom in International Law* (1971), p. 86; cf. above, pp. 35-6.

<sup>9</sup> *Ibid.*, pp. 89 and 174.

If D'Amato's view were accepted in practice, there would be disastrous consequences for world public order. A state which wished to prevent the formation of a rule allowing overflight of its territory by artificial satellites could no longer achieve its object by making protests; it would have 'to interfere with the satellite's flight' or 'retaliate in some other way against the Soviet Union unless she ceased to launch sputniks'.<sup>1</sup> Thus a polite difference of opinion would be converted into a major international dispute.

Moreover, D'Amato's view is inconsistent. A protest 'by all or nearly all the other States . . . may amount to a consensus, . . . which . . . would be effective evidence of international law',<sup>2</sup> but protests by individual States would not have similar effects. Protests can prevent the formation of special custom but not of general custom,<sup>3</sup> despite the fact that the difference between special custom and general custom is often hard to discern in practice.<sup>4</sup>

Finally, D'Amato's view receives no support from the judgments of international courts.<sup>5</sup>

In the *Lotus* case the Permanent Court said:

. . . the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests . . . This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent of the French government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts. It seems hardly probable, and it would not be in accordance with international practice, that the French government in the *Ortigia/Oncle-Joseph* case and the German government in the *Ekbatana/West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian courts, if they had really thought that this was a violation of international law.<sup>6</sup>

<sup>1</sup> *Ibid.*, p. 89 n. 21. Note that this gives an unfair advantage to great powers. A small power which would have no hesitation about protesting to the Soviet Union would probably not dare to resort to physical action against the Soviet Union. Moreover, D'Amato implies that even physical acts by an aggrieved State would have no legal significance unless they succeeded in preventing overflight by satellites. In practice, therefore, a State could prevent the formation of a rule permitting overflight only by shooting down satellites.

<sup>2</sup> *Ibid.*, p. 102 n. 34. Cf. above, p. 7.

<sup>3</sup> *Ibid.*, pp. 261-2.

<sup>4</sup> Cf. above, p. 30.

<sup>5</sup> It may be that protests carry greater weight if they are backed up by action (cf. above, p. 40 n. 1), but that is a difference of degree, not of kind. Cf. also p. 2 n. 1 and p. 9, above.

In diplomatic correspondence States treat the presence or absence of protests on previous occasions as important in determining the content of international law: McNair, *International Law Opinions* (1956), vol. 2, p. 153; *Foreign Relations of the United States* (1887), p. 837.

<sup>6</sup> *P.C.I.J.*, Series A, No. 10, p. 29. See also the dissenting opinion of Judge Altamira on p. 103, and cf. above, p. 40 n. 6. Note that the Court (and Judge Altamira) rejected Judge Loder's view that 'consent must not merely be tacit, but, in most cases, express' (*ibid.*, p. 60). In the *Elida* case (1915) the German Supreme Prize Court held that extension of the territorial sea is valid only if it is recognized by other States: 'a mere failure to object, however, is not identical with a positive concurrence of nations'. But the Court was not consistent, because it recalled that at a conference in 1882 'Germany's representative . . . declared, *without meeting with opposition*, that by the term "coastal waters" a zone of three miles was to be understood' (*American Journal of International Law*, 10 (1916), pp. 916, 918; italics added). See also the equivocal remarks by Sir Charles Russell in his argument before the Tribunal in the *Behring Sea* arbitration, cited by Jessup, *The*

In the *Fisheries* case the International Court emphasized the absence of protests by other States against Norway's use of straight baselines.<sup>1</sup> It is not clear whether the Court regarded this as a case of general custom or as a case of special custom,<sup>2</sup> but a few pages earlier the Court said that 'several States have deemed it necessary to follow the straight baselines method and . . . they have not encountered objections of principle by other States'<sup>3</sup> and this apparently involved an issue of general custom. Moreover, subsequent practice has interpreted the *Fisheries* case as laying down a precedent of general applicability, and not merely a prescriptive rule in favour of Norway alone.

In the *Fisheries Jurisdiction* case several judges emphasized the existence of protests as a strong argument against the legality of exclusive fishing zones exceeding twelve miles.<sup>4</sup> The judges who took a contrary view did not follow D'Amato's approach and regard protests as incapable of preventing the formation of a custom; instead, they emphasized that some other States had not protested.<sup>5</sup>

Finally, in his dissenting opinion in the *North Sea Continental Shelf* cases Judge Lachs said:

The first instruments that man sent into outer space traversed the air space of States and circled above them in outer space, yet the launching States sought no permission, nor did the other States protest. This is how the freedom of movement into outer space, and in it, came to be established and recognized as law within a remarkably short period of time . . . To postulate that all States, even those which initiate a given practice, believe themselves to be acting under a legal obligation is to resort to a fiction—and in fact to deny the possibility of developing such rules. For the path may indeed start from voluntary, unilateral acts relying on the confident expectation that they will find acquiescence or be emulated . . .<sup>6</sup>

## V. TREATIES AND CUSTOM

Can treaties create customary law? If States habitually make treaties undertaking certain obligations towards one another, can those treaties be cited as authority for the existence of such obligations in customary law? Professor D'Amato gives an almost unqualified 'yes' to these questions, and cites many cases in support of his view.<sup>7</sup>

But not all the cases support his view. In the *Lotus* case the Permanent Court *Law of Territorial Waters and Maritime Jurisdiction* (1927), p. 106; and see, generally, MacGibbon, this *Year Book*, 33 (1957), pp. 115, 138–9.

<sup>1</sup> *I.C.J. Reports*, 1951, pp. 116, 136–9. See also p. 39 n. 4, above.

<sup>2</sup> Cf. above, pp. 28–9. D'Amato, *The Concept of Custom in International Law* (1971), pp. 261–2, interprets it as a case of special custom. However, the ambiguity of the Court's judgment may suggest that the Court saw no essential difference between general and special custom, at least as far as the process of creating custom was concerned.

<sup>3</sup> *I.C.J. Reports*, 1951, pp. 116, 129.

<sup>4</sup> *I.C.J. Reports*, 1974, pp. 3, 47, 58, 161. Judge Dillard also emphasized the lack of protests against claims not exceeding twelve miles (*ibid.*, p. 58).

<sup>5</sup> *Ibid.*, p. 47.

<sup>6</sup> *I.C.J. Reports*, 1969, pp. 3, 230, 231.

<sup>7</sup> D'Amato, *The Concept of Custom in International Law* (1971), chapter 5. Not all the cases he cites are relevant: thus cases in which a treaty is interpreted by comparing its provisions with other treaties (*op. cit.*, pp. 119–20) have nothing to do with customary law.



dismissed the treaties cited by France as irrelevant, but only after it had said: 'it is not absolutely certain that this stipulation [found in several treaties] is to be regarded as expressing a general principle of [customary] law.'<sup>1</sup> The report of the Committee of Jurists on the Aaland Islands stated that 'the recognition of this principle [of self-determination] in a certain number of treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the law of nations'.<sup>2</sup> In *The State (Duggan) v. Tapley* the Irish Supreme Court said that it 'does not accept the view that a principle of [customary] international law can be established in this way [by citing treaties]—at least where the principle sought to be established is contrary to, or qualifies, an existing rule'.<sup>3</sup> In *West Rand Central Gold Mining Co. v. The King*, Lord Alverstone said: 'the reference which . . . writers . . . make to stipulations in particular treaties as evidence of international law is as little convincing as the attempt . . . to establish a trade custom . . . by adducing evidence . . . of particular contracts . . . We have already pointed out how little value particular stipulations in treaties possess as evidence of that which may be called international common law.'<sup>4</sup>

Moreover, as we shall see, many cases regard treaties as authority for customary law only in certain circumstances, which clearly suggests that in other circumstances treaties are not authority for customary law.

The present author has defined State practice in very wide terms,<sup>5</sup> and has no difficulty in regarding treaties as State practice. But State practice, in order to give rise to customary law, must be accompanied by *opinio juris*, i.e. by a belief (or, rather, a statement) by States that certain conduct is required or permitted by customary law.<sup>6</sup> Does the requirement of *opinio juris* apply to the creation of customary rules by treaties, or does the relationship between treaties and custom disprove (or constitute an exception to) the present author's views about *opinio juris*?<sup>7</sup>

There have been cases in which courts have inferred customary rules from treaties without mentioning *opinio juris*.<sup>8</sup> However, such cases may simply

<sup>1</sup> *P.C.I.J.*, Series A, No. 10, p. 27.

<sup>2</sup> *League of Nations, Official Journal*, Special Supplement No. 3 (1920), p. 5.

<sup>3</sup> *I.L.R.* 18 (1951), pp. 336, 338–9.

<sup>4</sup> [1905] 2 K.B. 391, 402, 405.

<sup>5</sup> See above, p. 10.

<sup>6</sup> In the case of a permissive rule, *opinio juris* need not take the form of an express statement; a claim to be entitled to act in a particular way can be inferred from the fact that States do act in that way (cf. above, p. 38). However, the fact that States are permitted by treaty to act in a particular way does not necessarily justify the inference that States claim to be entitled to act in that way in the absence of a treaty. But see below, p. 44, concerning treaties claiming a right to take action affecting third parties.

<sup>7</sup> A similar problem arises, regardless of the way in which *opinio juris* is interpreted. D'Amato, *The Concept of Custom in International Law* (1971), pp. 161–2, says that treaties articulate a norm of international law, which appears to bring his views about treaties into line with his general theory of articulation (cf. above, p. 35). The fatal flaw in this reasoning is that treaties do not, in most cases, articulate the norm as one of *customary* law (unless one assumes that laying down a rule in a treaty automatically means articulating the rule as a norm of customary law—but that is to assume without argument the very thing which D'Amato sets out to prove).

<sup>8</sup> *Fisheries Jurisdiction* case, *I.C.J. Reports*, 1974, pp. 3, 26; *Nottebohm* case, *ibid.*, 1955, pp. 4, 22–3; *Lauritzen v. Government of Chile* (1956), *I.L.R.* 23 (1956), pp. 703, 729–31; *Lagos v. Baggianini* (1953), *I.L.R.* 22 (1955), p. 533; *Società Arethusa Film v. Reist* (1955), *ibid.*, p. 544; *Whiteman, Digest of International Law*, vol. 6 (1968), pp. 569, 570; *ibid.*, vol. 3 (1964), p. 934

represent an elision in judicial reasoning; although there are many cases which do not mention *opinio juris*, there are none which say *expressly* that it is unnecessary.

Moreover, the need for *opinio juris* is clearly stated in the *North Sea Continental Shelf* cases, where Denmark and the Netherlands argued that a customary rule, corresponding to Article 6 of the Geneva Convention on the Continental Shelf, had 'come into being since the Convention, partly because of its [the Convention's] own impact, partly on the basis of subsequent State practice'. The Court commented that this argument implied that a rule inspired by Article 6 'has . . . passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*'.<sup>1</sup> In order for this to happen, said the Court, 'State practice . . . should . . . have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved'.<sup>2</sup> Denmark and the Netherlands invoked, *inter alia*, various bilateral treaties for the delimitation of the continental shelf as evidence that the rule laid down in Article 6 of the Convention had become a rule of customary law. The Court held that the treaties showed nothing of the sort, because they were not accompanied by *opinio juris*.

. . . the parties agreed to draw . . . the boundaries according to the principle of equidistance. There is no evidence that they so acted because they felt legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so.<sup>3</sup>

The better view would appear to be that treaties, like other forms of State practice, must be accompanied by *opinio juris* in order to create customary law. It is now proposed to examine the ways in which the requirement of *opinio juris* can be satisfied in the case of treaties.

### *Treaties providing for action affecting third parties*

Treaties sometimes provide for action against third parties or their nationals. The legal justification of such action cannot be found in the treaty, since treaties cannot take away the rights of third parties. By entering into such treaties, the contracting parties are in effect claiming that customary law permits them to take such action *vis-à-vis* other States, and, if other States do not protest against the conclusion or execution of such treaties, one is entitled to infer that there is a permissive rule of international law authorizing such action.

Examples may be found in treaties providing for the prosecution of nationals of third States for crimes committed outside the territory of the contracting States.<sup>4</sup> Similarly, the fact that Article 6 of the North Atlantic Treaty of 1949

(for a contrary view, see Berber, *Rivers in International Law* (1959), pp. 128-59). The same thing can happen with other forms of State practice; see above, p. 32.

In the *Barcelona Traction* case the need for *opinio juris* was mentioned by Judge Ammoun (*I.C.J. Reports*, 1970, pp. 3, 305-6), but not by Judge Wellington Koo (*I.C.J. Reports*, 1964, pp. 6, 63) or Judge Gros (*I.C.J. Reports*, 1970, pp. 277-8). The Court contented itself with observing that the treaties invoked were inconsistent and irrelevant (*I.C.J. Reports*, 1970, p. 40).

<sup>1</sup> *I.C.J. Reports*, 1969, pp. 3, 41.

<sup>3</sup> *Ibid.*, pp. 44-5; and see above, p. 32 n. 1.

<sup>4</sup> Akehurst, this *Year Book*, 46 (1972-3), pp. 145, 160-2. In Article 3 of the Washington

<sup>2</sup> *Ibid.*, p. 43.

provides for collective self-defence in the event of an 'attack . . . on the vessels or aircraft . . . of any of the parties' suggests that the customary right of self-defence<sup>1</sup> can be exercised in the event of attacks on ships or aircraft as well as in the event of attacks on territory. When the treaties setting up the Armed Neutralities of 1780 and 1800 provided for reprisals by all the parties against a belligerent which interfered unlawfully with the ships of one of the parties, they were in effect claiming that customary law permitted collective reprisals in such circumstances.<sup>2</sup> In the *Wimbledon* case the Permanent Court pointed out that no one had ever alleged that the neutrality of Turkey or the United States had been violated by the performance of their obligations under the treaties governing the Suez and Panama canals, and concluded that Germany's customary law duties as a neutral nation would not be violated by permitting the passage of foreign ships carrying contraband through the Kiel canal, as required by Article 380 of the Treaty of Versailles;<sup>3</sup> in other words, the treaties governing the Suez and Panama canals claimed in effect that customary rules of neutrality did not forbid the passage of ships carrying contraband, and this claim had created or confirmed a permissive rule of customary law because it had not been challenged by belligerent States which were not parties to the treaties.

*Statements in a treaty or in the travaux préparatoires about customary law*

Evidence of *opinio juris* may take the form of statements about customary law in the text of a treaty or in the *travaux préparatoires*.<sup>4</sup> The most obvious example of such statements is a statement that some or all of the provisions of the treaty codify (or are declaratory of) existing customary law, but the statement can also take other forms. For instance, in the *North Sea Continental Shelf* cases Denmark and the Netherlands argued that the development of a customary law rule of delimitation, corresponding to Article 6 of the Geneva Convention on the Continental Shelf, which had begun before 1958, had been completed by the signing of that Convention; however, they were unable to cite any statement in the Convention or in the *travaux préparatoires* which supported their argument, and indeed the Court said that the statements in the *travaux préparatoires* indicated that Article 6 had been 'proposed . . . with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law'.<sup>5</sup> When Convention of 6 February 1922 the contracting parties claimed the power to try individuals acting on behalf of *any* State if they broke the rules laid down in the Convention for the protection of merchant ships in wartime.

<sup>1</sup> The fact that Article 51 of the United Nations Charter speaks of self-defence as an 'inherent right' suggests that the right still exists under customary law as well as by virtue of Article 51 (although the circumstances in which it may be exercised are probably limited by Article 51).

<sup>2</sup> Akehurst, this *Year Book*, 44 (1970), pp. 1, 3-4.

<sup>3</sup> *P.C.I.J.*, Series A, No. 1, pp. 26, 28.

<sup>4</sup> Such statements constitute State practice and evidence of *opinio juris* even if the treaty never comes into force; the same is true of statements made during negotiations which do not succeed in producing a treaty. See Baxter, *Recueil des cours*, 129 (1970), pp. 25, 99-101; above, pp. 4-5; below, p. 46 n. 2 and p. 49. Note that many of the cases cited on p. 46, below, concerned treaties which had not entered into force at the time of the case in question.

<sup>5</sup> *I.C.J. Reports*, 1969, pp. 3, 38. Cf. Judge Morelli on p. 197.



a treaty applies a rule to the facts of a particular case, there may be statements in the treaty or in the *travaux préparatoires* that the rule in question is a rule of customary law.<sup>1</sup> Alternatively, a treaty may contain a recital that something is a rule of customary law, and then go on to provide machinery for the enforcement of the rule,<sup>2</sup> or to make exceptions to the rule;<sup>3</sup> in such cases the recital is authority for the content of customary law, but the rest of the treaty is not. Finally a treaty which provides for the waiver of rights or obligations furnishes authority for the view that the rights or obligations had some foundation.<sup>4</sup>

Treaties codifying customary law have frequently been cited as authority for customary law in judgments and State practice. This is particularly true of certain provisions of the thirteenth Hague Convention of 1907,<sup>5</sup> of the Geneva Conventions of 1958 on the Law of the Sea,<sup>6</sup> of the Vienna Convention on Diplomatic Relations of 1961,<sup>7</sup> of the Vienna Convention on Consular Relations of 1963,<sup>8</sup> and of the Vienna Convention on the Law of Treaties.<sup>9</sup>

In most of these cases the court or State invoking the treaty provisions said that they were declaratory of customary law. What grounds did the court or State have for thinking that the treaty was declaratory of customary law? Where the preamble to a treaty declares that it is declaratory of customary law, it is easy enough to cite the preamble.<sup>10</sup> Such preambles are, however, very rare,

<sup>1</sup> The bilateral delimitation agreements cited in the *North Sea Continental Shelf* cases (see above, p. 44) did not help to establish a rule of customary law, because there was no such statement in the agreements or in the *travaux préparatoires*.

<sup>2</sup> e.g. the unratified treaties cited by the Nuremberg Tribunal (1946), Cmd. 6964, p. 40. See also the judgment of the Tokyo Tribunal, *Annual Digest*, 15 (1948), pp. 356, 362-3, and the Genocide Convention, *United Nations Treaty Series*, vol. 78, p. 277.

<sup>3</sup> e.g. the Anglo-American Liquor Treaty of 1924: Colombos, *International Law of the Sea*, sixth edition (1967), p. 142 (see also *ibid.*, pp. 95-7).

<sup>4</sup> e.g. Akehurst, *A Modern Introduction to International Law*, second edition (1971), p. 117, at n. 1. Treaties providing for the waiver of claims are much weaker authority because the fact that a claim was waived does not necessarily imply it was well founded.

<sup>5</sup> *Attilio Regolo* case (1945), *R.I.A.A.*, vol. 12, pp. 1, 8.

<sup>6</sup> See below, n. 10. See also *Empresa Hondurena de Vapores v. McLeod* (1962), I.L.R. 34, pp. 51, 59-60; *Dominion Coal Co. v. Municipality of the County of Cape Breton* (1963), I.L.R. 42, pp. 62, 78; *In re the Ownership and Jurisdiction over Offshore Mineral Rights* (1967), I.L.R. 43, pp. 93, 104, 113; *Fisheries Jurisdiction* case, I.C.J. Reports, 1973, pp. 3, 25-7, per Judge Fitzmaurice; *Barcelona Traction* case, I.C.J. Reports, 1970, pp. 3, 187 and 305, per Judges Jessup and Ammoun.

<sup>7</sup> *Canadian Year Book of International Law*, 3 (1965), pp. 317-18; *Revue belge de droit international*, 9 (1973), p. 639; I.L.R. 38, pp. 162, 167; *Barcelona Traction* case, I.C.J. Reports, 1970, pp. 3, 305, per Judge Ammoun.

<sup>8</sup> *Canadian Year Book of International Law*, 5 (1967), p. 259; *International Legal Materials*, 13 (1974), p. 1436, Article 3; *Barcelona Traction* case, I.C.J. Reports, 1970, pp. 3, 305, per Judge Ammoun.

<sup>9</sup> *Barcelona Traction* case, I.C.J. Reports, 1970, pp. 3, 303, 305, per Judge Ammoun; *Namibia* case, I.C.J. Reports, 1971, pp. 16, 47; *Appeal Relating to the Jurisdiction of the I.C.A.O. Council*, I.C.J. Reports, 1972, pp. 46, 63-4, 67, 101-2, 107, 109, 127-30, 132, 138, 146, 148; *Fisheries Jurisdiction* case, I.C.J. Reports, 1973, pp. 3, 14, 18, 21, 43, 47; *Nuclear Tests* case, I.C.J. Reports, 1974, pp. 253, 334-8, 349, 357, 418; *Kingdom of Greece v. Federal Republic of Germany* (1972), I.L.R. 47, pp. 418, 450-2; Decision No. 9 of the Council of Europe Appeals Board (*Maryan Green*), p. 4 n. 1; Briggs, *American Journal of International Law*, 68 (1974), p. 51; Lawrie, *International Affairs*, 47 (1971), p. 708.

<sup>10</sup> *Fisheries Jurisdiction* case, I.C.J. Reports, 1974, pp. 3, 22; *ibid.*, 1973, pp. 3, 25, per Judge Fitzmaurice.

because it is usually impossible for the drafters of a treaty to claim honestly that all its provisions are declaratory of customary law; most of the provisions may be, but others are bound to contain an element of innovation, if only because State practice is often so sparse, ambiguous or conflicting that any body which tries to codify customary law soon finds itself crossing the often imperceptible boundary between codification and progressive development.<sup>1</sup> It is often possible to find statements in the *travaux préparatoires* that particular provisions are declaratory of customary law, but the discovery and citation of such statements is a tedious process.<sup>2</sup> So, not surprisingly, in the cases already mentioned the courts or States concerned have usually contented themselves with saying that the treaty is declaratory of customary law without citing any authority for saying that the treaty is declaratory. This approach is not as haphazard as it may seem, since it is common knowledge that most of the provisions of the treaties cited in the previous paragraph were declaratory of customary law.<sup>3</sup> The significant thing, however, is that courts or States invoking such treaties often seem to find it necessary to justify such invocation by saying that the treaty is declaratory of customary law; this suggests that the courts or States concerned would have been (to say the least) much less ready to invoke the treaty if they had not thought that it was declaratory of pre-existing law.

When a treaty or its *travaux préparatoires* contain statements that part or all of the treaty is declaratory of customary law, it is not enough to show that the States making those statements knew them to be untrue; if other States do not challenge those statements, they can create a new rule of customary law,<sup>4</sup> although the existence of conflicting practice may sometimes prevent that happening.<sup>5</sup>

It may also be possible to point to statements in the treaty or in its *travaux préparatoires* that part or all of the treaty is not declaratory of customary law. Thus in the *Asylum* case Colombia argued that the Montevideo Convention of 1933 'has merely codified principles which were already recognized by Latin American custom'; the Court held that 'this argument is invalidated by the preamble [of the Montevideo Convention] which states that this Convention modifies the Havana Convention'.<sup>6</sup> In *Re Martínez* the Italian Court of Cassation held that Article 24 of the Geneva Convention on the Territorial Sea was not

<sup>1</sup> Shihata, *Revue égyptienne de droit international*, 22 (1966), pp. 51, 63-5; Baxter, *Recueil des cours*, 129 (1970), pp. 25, 39-42.

<sup>2</sup> It is possible (but improbable) that a treaty may be declaratory of customary law even though there is no statement to that effect in the treaty or in the *travaux préparatoires*. In such a case one can only prove the declaratory nature of the treaty by examining all the available evidence of State practice. But this process is even more tedious than examining the *travaux préparatoires*. Moreover, by proving the declaratory nature of the treaty in this way, one is proving customary law without reference to the treaty; and, once customary law *dehors* the treaty has been proved, citation of the treaty becomes unnecessary. See Baxter, *Recueil des cours*, 129 (1970), pp. 25, 42-3.

<sup>3</sup> But there is a difference between most of the provisions being declaratory and all the provisions being declaratory; by overlooking this difference, judgments and State practice run the risk of treating provisions which were not declaratory as if they were declaratory. See, for example, the citation of the procedural provisions of the Vienna Convention on the Law of Treaties in the *Fisheries Jurisdiction* case, *I.C.J. Reports*, 1973, pp. 3, 21.

<sup>4</sup> See above, pp. 5 and 37.

<sup>5</sup> See above, p. 20.

<sup>6</sup> *I.C.J. Reports*, 1950, pp. 266, 277.



declaratory of customary law, partly because statements had been made at meetings of the International Law Commission and at the Geneva conference asserting its non-declaratory character.<sup>1</sup>

Is it possible to infer that a treaty is not declaratory of customary law from the fact that it allows for withdrawal, revision or reservations?

As far as clauses providing for withdrawal or revision are concerned the answer is probably no.<sup>2</sup> The reason for inserting such clauses may have been to give States an opportunity to reconsider their position in the event of customary law changing after the conclusion of the treaty; their insertion is thus not necessarily an indication that the treaty was not declaratory of customary law as it existed when the treaty was concluded.

Reservations present more of a problem. The judgment in the *North Sea Continental Shelf* cases suggests that the presence of a clause permitting reservations to a particular provision prevents that provision being regarded as declaratory of customary law.<sup>3</sup> But this view is open to question. The Court relied strongly on the idea that customary law is binding on all States. So it is, as a general rule, but there can be exceptions in the case of dissenting States;<sup>4</sup> it is only natural that a dissenting State, which is not bound by a particular rule of customary law, should be allowed to make a reservation against an article of a treaty which codifies that rule. Alternatively, a State may claim that a particular provision in a treaty is not declaratory of customary law and may refuse to accept that provision; other States, while disagreeing with that claim, may prefer that the first State should become a party to the treaty, even at the cost of making a reservation to the provision in question, than that it should be prevented from becoming a party to the treaty at all. Of course, if many reservations are made to a particular provision, they make it difficult to regard that provision as declaratory of customary law, although difficulty is not the same as impossibility; the mere fact that reservations are permitted casts little doubt on the declaratory nature of the provisions concerned if no reservations or very few reservations are made in fact.<sup>5</sup>

<sup>1</sup> I.L.R. 29, pp. 170, 172-4. See also above, p. 45, and Akehurst, this *Year Book*, 46 (1972-3), pp. 145, 166 n. 1.

<sup>2</sup> Baxter, *Recueil des cours*, 129 (1970), pp. 25, 51-3. *Contra*, Judge Petré's separate opinion in the *Nuclear Tests* case, *I.C.J. Reports*, 1974, pp. 253, 305. See also Thirlway, *International Customary Law and Codification* (1972), p. 94, and Judge Padilla Nervo's separate opinion in the *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, pp. 3, 87.

<sup>3</sup> *I.C.J. Reports*, 1969, pp. 3, 38-9. In fact, Denmark and the Netherlands argued, not that Article 6 of the Geneva Convention on the Continental Shelf was declaratory of existing customary law, but that the development of a customary rule corresponding to Article 6, which had begun before 1958, had been completed by the signing of the Convention. However, if the possibility of making reservations was fatal to that argument (as the Court held), it would seem *a fortiori* to be fatal to any claim that the provision in question is declaratory of customary law.

<sup>4</sup> See above, pp. 23-7.

<sup>5</sup> The views expressed by the Court in the *North Sea Continental Shelf* cases have been criticized by Baxter, *Recueil des cours*, 129 (1970), pp. 25, 47-51; Brown, *Current Legal Problems*, 23 (1970), pp. 187, 209; Goldie, *American Journal of International Law*, 63 (1969), p. 536; Lang, *Le plateau continental de la Mer du Nord* (1970), pp. 98-9; Thirlway, *International Customary Law and Codification* (1972), pp. 120-4. See also the dissenting opinions of Judges Koretsky, Morelli, Lachs and Sørensen, *I.C.J. Reports*, 1969, pp. 3, 163-4, 197-8, 223-5, 248 and 252-3.



Finally, the fact that a treaty has received few ratifications is not necessarily an argument for not regarding it as declaratory of customary law. The most frequent reasons for failure to ratify are inertia and lack of Parliamentary time (if ratification requires the participation of the legislature, as it does in many countries).<sup>1</sup> However, these are reasons for delaying ratification and not for withholding it permanently. Consequently, the persuasive value of a treaty as evidence of customary law will not be undermined by widespread failure to ratify early in its life, but will gradually wane if many years pass without bringing many ratifications.<sup>2</sup> Even so, the treaty may still retain some value as evidence of customary law; one possible reason for not ratifying is that States may think that ratification is unnecessary if the rules laid down in the treaty are already binding as customary law. In addition, prolonged paucity of ratifications is more damaging if all the provisions of a treaty are alleged to be declaratory of customary law<sup>3</sup> than it is if only some of the provisions are alleged to be declaratory of customary law;<sup>4</sup> in the latter case, States may genuinely believe that part of the treaty is declaratory of customary law and yet refuse to ratify it because they object to the other parts.

#### *Statements subsequent to the treaty*

Statements by States that the rules of customary law are the same as rules laid down in a treaty can be made in the text of the treaty or in its *travaux préparatoires*. They can also be made after the conclusion of the treaty. Such subsequent statements can take several different forms. They may allege that customary law was the same at the time of the treaty's conclusion, or they may allege that customary law has fallen into line with the treaty at some time (specified or unspecified) after the treaty's conclusion. They may be made by States parties to the treaty, or by other States. They may refer to the treaty by name, or they may not. In a sense any invocation of a provision of a treaty by or against a State which is not a party to it must be interpreted as a statement that customary law coincides with that provision, unless the case can be explained by virtue of the rules of the law of treaties which occasionally allow a treaty to create rights or obligations for third States.

But, in one form or another, a statement recognizing the coincidence between the treaty and customary law is essential. Article 38 of the Vienna Convention on the Law of Treaties provides: 'Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of law, recognized as such.' The words 'recognized as such' were added at the Vienna Conference in order to emphasize that rules laid down in treaties could not transmute themselves automatically into customary law; the consent of States was needed for the creation of new customary law.<sup>5</sup>

<sup>1</sup> *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, pp. 3, 226, *per* Judge Lachs.

<sup>2</sup> Baxter, *Recueil des cours*, 129 (1970), pp. 25, 99-101.

<sup>3</sup> *Asylum* case, *I.C.J. Reports*, 1950, pp. 266, 277.

<sup>4</sup> Cf. above, p. 46 n. 2.

<sup>5</sup> *United Nations Conference on the Law of Treaties, Official Records*, First Session, pp. 197-201, and Second Session, pp. 63-72.

Despite some ambiguities, the judgment in the *North Sea Continental Shelf* cases supports this view. Denmark and the Netherlands argued that a rule of customary law, identical to the rule contained in Article 6 of the Geneva Convention on the Continental Shelf, had 'come into being since the Convention, partly because of its [the Convention's] own impact, partly on the basis of subsequent practice'. In dealing with the first half of this argument, the Court said: 'With respect to the . . . elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that . . . a very widespread and representative participation in the convention might suffice of itself . . .'<sup>1</sup> Thirlway interprets this passage to mean that *opinio juris* could have been inferred from widespread and representative participation, and that no express evidence of *opinio juris* was necessary.<sup>2</sup> However, it is more likely that the Court was here thinking of the quantitative elements which are often regarded as necessary for the creation of customary law, such as repetition and the passage of time. In the next paragraph of its judgment, the Court said that 'State practice . . . should have been both extensive and virtually uniform . . . and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved'.<sup>3</sup> From this it is clear that *opinio juris* is not something which can be inferred from practice, however extensive; it is an additional requirement.<sup>4</sup> Moreover, as we have seen, the Court was very strict in requiring evidence of *opinio juris* when considering the second half of the Danish and Dutch argument;<sup>5</sup> it is hardly to be expected that a strict approach to *opinio juris* in the context of the second half of the argument would be combined with a lax approach in the context of the first half of the argument. After all, the Court prefaced its consideration of both parts of the argument with the warning that 'this result is not lightly to be regarded as having been attained'.<sup>6</sup>

Whether or not a rule laid down initially in a treaty is subsequently accepted as a rule of customary law is a question of fact. No useful purpose is served by trying to make *a priori* distinctions between rules which are capable of ripening into customary rules and rules which do not have that capacity.<sup>7</sup>

However, some predictions can be made about the kinds of treaty rules which are most likely to be subsequently accepted as customary rules (there

<sup>1</sup> *I.C.J. Reports*, 1969, pp. 3, 41 and 42.

<sup>2</sup> Thirlway, *International Customary Law and Codification* (1972), p. 86.

<sup>3</sup> *I.C.J. Reports*, 1969, pp. 3, 43.

<sup>4</sup> It is submitted that probably the only way such a requirement could be satisfied is by citing express statements by the States concerned; they might, for instance, have said that they were ratifying or acceding to the Convention because they considered that all of its provisions were identical with customary law.

<sup>5</sup> See above, pp. 31-2 and 44.

<sup>6</sup> *I.C.J. Reports*, 1969, pp. 3, 41.

<sup>7</sup> For examples of such distinctions, see D'Amato, *The Concept of Custom in International Law* (1971), pp. 105-12, and the judgment in the *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, pp. 3, 42. This aspect of the judgment is cogently criticized by Marek, *Revue belge de droit international*, 6 (1970), pp. 44, 58. See also Judge Lachs' dissenting opinion, *I.C.J. Reports*, 1969, pp. 3, 222-5; Baxter, *Recueil des cours*, 129 (1970), pp. 25, 62-4; and Nelson, *Modern Law Review*, 35 (1972), pp. 52, 53-4.

is no certainty that such acceptance will occur, only varying degrees of probability).

The probability of such acceptance occurring varies in inverse proportion to the extent to which the treaty rules differ from previously accepted rules of customary law.<sup>1</sup> In particular, treaty rules which merely add precision to customary law are very likely to be accepted as customary rules in the future; thus, treaty provisions fixing river boundaries in accordance with the *Thalweg* principle could be regarded as simply adding greater refinement to the principle of equal division, laid down earlier by Grotius and Vattel. Indeed, the difference between such treaties and treaties which are declaratory of pre-existing customary law is really only a difference of degree, emphasis or viewpoint, for even a treaty which is declaratory of pre-existing customary law (by codifying it or by applying it to the facts of a specific case) adds some measure of precision to it. This may explain why courts often regard treaties adding precision to customary law as authority for customary law, without citing any evidence that the treaty rules have been followed in the non-treaty practice of States.<sup>2</sup>

Treaty rules are fairly likely to be accepted as customary rules if there is uncertainty as to the content of pre-existing customary law. In particular, diplomats and municipal judges who have little experience in handling the sources of international law are likely to lack the patience to sift through a mass of conflicting evidence of customary law; instead, they will often apply the rules laid down in a more succinct and accessible document such as a multi-lateral treaty, a General Assembly resolution or a resolution of an unofficial body such as the *Institut de droit international*. The rules contained in such documents may not have been customary law at the outset, but they are turned into customary law by subsequent application (if it is accompanied by *opinio juris*). However, it should be noted that subsequent application, which is essential if these rules are to become customary law, may not always occur. For instance, if the uncertainty of customary law is caused by a clash of interests between different groups of States, it is likely that each group will continue to adhere to the view of customary law which suits its interests, instead of bringing its non-treaty practice into line with treaties which represent a compromise between the two groups of States. Thus disputes between capitalist and communist States over the expropriation of foreign-owned property have been settled by treaties which represent a compromise between the capitalist view of customary law (full compensation) and the communist view (no compensation), but rules of customary law have not developed out of the treaties because the

<sup>1</sup> Cf. *The State (Duggan) v. Tapley*, above, p. 43.

<sup>2</sup> e.g. *New Jersey v. Delaware* (1933), 291 U.S. 361, 381-4, applying the *Thalweg* principle laid down in earlier treaties. Cf. the finding of the Nuremberg Tribunal that the Hague Regulations of 1907 differed from previously accepted customary law, but that by 1939 'these rules . . . were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war' (Cmd. 6964, 1946, p. 65). The Tribunal did not explain how the rules had become rules of customary law. Perhaps part of the explanation lies in the fact that the rules simply added precision to the basic principle of customary law that a belligerent must not cause suffering which is not justified by military necessity; the rules were evidence of the changing content of that principle. Cf. Baxter, this *Year Book*, 41 (1965-6), pp. 275, 280-3, 297-8.



non-treaty practice of each side continues to follow the view of customary law previously taken by that side.<sup>1</sup>

It is also fairly likely that treaty rules will be accepted as rules of customary law if many States are dissatisfied with pre-existing customary law. Where such dissatisfaction exists, any well-publicized statement, whether it be a treaty, a General Assembly resolution or a resolution of an unofficial body such as the *Institut de droit international*, may constitute a catalyst which will stimulate new practice and thus a new customary rule. But the statement, if it is only a statement of *lex ferenda*, cannot itself create a new customary rule; it is the practice inspired by the statement, and accompanied by *opinio juris*, which creates the rule.<sup>2</sup> The process may take place very quickly, but that should not blind us to the fact that there is more than one stage in the process.

The law of the sea provides a topical illustration of this process. Much of the old customary law of the sea is viewed with dissatisfaction by States because of its growing uncertainty and inability to respond to technological changes. All the present indications are that the adoption of a new treaty on the law of the sea by the United Nations Conference on the Law of the Sea will be immediately followed by a rush of claims by States inspired by the treaty, even though most of the provisions of the treaty will not be (and will not even be claimed to be) declaratory of existing law, and even though many years may pass before the treaty enters into force. Indeed, even the prospect of such a treaty being adopted has stimulated some States to make claims inspired by predictions of what the content of that treaty may be,<sup>3</sup> and such claims are likely to grow in number now that the adoption of an informal single negotiating text<sup>4</sup> by the conference has made it easier for States to guess what the content of the treaty may be. It is probable that a clear failure by the conference to reach agreement would also stimulate States to extend their claims to areas of the sea, just as the failure of the 1930, 1958 and 1960 conferences to reach agreement on the width of the territorial sea stimulated many States to claim a wider territorial sea. There are thus a number of things which can stimulate new State practice; but it is the practice (accompanied by *opinio juris*), and not the stimuli, which creates new customary law. Thus, although the practice of States may seek to anticipate the outcome of the conference, the International Court has refused to do the same.<sup>5</sup>

<sup>1</sup> The treaties add to the uncertainty of the old customary law (disputes are settled by treaty and not in accordance with customary law, and the resulting absence of recent precedents makes customary law uncertain), but they do not generate new customary law.

<sup>2</sup> Thirlway, *International Customary Law and Codification* (1972), p. 64. Such practice does not always occur. For instance, when States became dissatisfied with the absence of a rule of customary law requiring extradition, they rectified the situation by concluding extradition treaties, but the extradition treaties did not lead to a change in non-treaty practice and thus in customary law.

<sup>3</sup> Another factor inspiring the claims is a belief that other States will soon make similar claims.

<sup>4</sup> Text in *International Legal Materials*, 14 (1975), p. 682.

<sup>5</sup> *Fisheries Jurisdiction* case, *I.C.J. Reports*, 1974, pp. 3, 23-4. The Court also noted 'that a number of States has asserted an extension of fishing limits', but apparently regarded such claims as insufficient to establish a customary rule, presumably because they conflicted with pre-existing law and had been challenged by other States.

## SUMMARY

1. Customary international law is created by State practice. State practice means any act or statement by a State from which views about customary law can be inferred; it includes physical acts, claims, declarations *in abstracto* (such as General Assembly resolutions), national laws, national judgments and omissions. Customary international law can also be created by the practice of international organizations and (in theory, at least) by the practice of individuals.

2. As regards the quantity of practice needed to create a customary rule, the number of States participating is more important than the frequency or duration of the practice. Even a practice followed by a few States, on a few occasions and for a short period of time, can create a customary rule, provided that there is no practice which conflicts with the rule, and provided that other things are equal; but other things are seldom completely equal, because there are various presumptions (e.g. the presumption in favour of the liberty of State action) which need to be taken into account.

3 (a). Major inconsistencies in State practice prevent the creation of a customary rule; such inconsistencies cannot be explained away by saying that one type of practice is more important than another or that the practice of some States is more important than the practice of others.

3 (b). A State is not bound by a customary rule if it has consistently opposed that rule from its inception. However, a new State is bound by rules which were well established before it became independent.

3 (c). Special (e.g. regional) customs can co-exist with general customs. Apart from the number of States bound by the customs, there is little difference between special and general customs; where the number of States following one practice is roughly the same as the number of States following another practice, it may be difficult to say which is the special custom and which is the general custom.

4. *Opinio juris* is necessary for the creation of customary rules; State practice, in order to create a customary rule, must be accompanied by (or consist of) statements that certain conduct is permitted, required or forbidden by international law (a claim that conduct is permitted can be inferred from the mere existence of such conduct, but claims that conduct is required or forbidden need to be stated expressly). It is not necessary that the State making such statements believes them to be true; what is necessary is that the statements are not challenged by other States.

5. Treaties are part of State practice and can create customary rules if the requirements of *opinio juris* are met, e.g. if the treaty or its *travaux préparatoires* contain a claim that the treaty is declaratory of pre-existing customary law. Sometimes a treaty which is not accompanied by *opinio juris* may nevertheless be imitated in subsequent practice; but in such cases it is the subsequent practice (accompanied by *opinio juris*), and not the treaty, which creates customary rules.





# THE LIMITS OF THE POWER OF EXPULSION IN PUBLIC INTERNATIONAL LAW\*

By GUY S. GOODWIN-GILL<sup>1</sup>

THE power of expulsion of aliens is traditionally described, without more, as the inherent and sovereign right of every State; but little investigation has been made into the nature, function and purpose of the power, or into the manner in which its exercise is controlled by public international law. The present article aims to go some way towards filling this gap and to try to establish the limits upon the discretionary competence to expel aliens; for statements that the right of expulsion must not be 'abused', or that its exercise must not be 'arbitrary', are insufficient and, by their vagueness, may encourage what they would seek to restrain.

A brief examination will be made of the traditional approach to the State's power of expulsion, followed by a statement of the approach submitted by the present writer, which is to view the power as a *discretion*, not absolute, but limited by the rules and standards of international law. Next, the inquiry will concentrate upon the function, justification and manner of expulsion, and upon the practice in this regard of a selection of municipal systems, in order to see what States do and what they claim, and as a comparative study, to serve as an initial, though necessarily limited, step towards a study of international standards. Finally, consideration will be given to the influence of treaty obligations as a source both of specific limitations upon the general power and of controlling standards.

## I. INTRODUCTION

The word 'expulsion' is commonly used to describe that exercise of State power which secures the removal, either 'voluntarily', under threat of forcible removal, or forcibly, of an alien from the territory of a State. Municipal laws show little consistency, but a distinction is sometimes drawn between expulsion and deportation, the latter being confined to proceedings initiated at the port of entry and designed to effect departure after refusal of admission. In the United States, 'deportation statutes' were first passed to facilitate the removal of illegal immigrants, but it will be seen that over the years deportation has developed its own peculiar regime.<sup>2</sup>

\* © Dr. Guy S. Goodwin-Gill, 1976.

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<sup>2</sup> Konvitz, *Civil Rights in Immigration* (1953), pp. 93-6. The status of the illegal entrant varies from State to State; sometimes he remains susceptible to summary removal, while in other cases he benefits to the full from due process provisions and the right of appeal. See *R. v. Governor of Pentonville Prison, ex parte Azam*, [1974] A.C. 18.

The first and most general condition which is held to limit the power to expel is that its exercise should be confined to aliens. This limitation flows from the nature of the legal relationship which exists between the expelling State and the State of which the alien is a national. Thus, the duty of a State to receive its nationals expelled from another State has been described as the corollary of the 'right' of expulsion. Schwarzenberger observes:<sup>1</sup>

To make the right of expulsion effective, the practice of States has insisted on the duty of the home State to receive back any national expelled from a foreign State.

Oppenheim describes the function of nationality as involving one particular right and one particular duty:<sup>2</sup>

The right is that of protection over its citizens abroad which every State holds . . . The duty is that of receiving on its territory such of its citizens as are not allowed to remain on the territory of other States.

Observations of this kind leave many questions unanswered. It is a matter for debate to what extent a State is free to expel persons long established on its territory who may be considered to have acquired the effective nationality of that State.<sup>3</sup> Moreover it is far from clear that a State is under a duty to receive those of its nationals who have been unlawfully expelled from another State, at least in so far as the duty to admit is one which is owed between States alone.

Recently, the view has been canvassed that the State's duty to admit its nationals may be owed not only to a second State which wishes to repatriate them, but to any legal person with a recognized interest in the preservation of the human right of an individual to enter his own State.<sup>4</sup> The fortunes of this idea of an *actio popularis* have varied,<sup>5</sup> but the right of entry as a human right must not pass unconsidered. It features in many recent international instruments,<sup>6</sup> and it underlay the controversy over the admission of United Kingdom citizens from East Africa. It can, however, be distinguished from whatever rights a State may have to secure the removal of an alien from its own territory. At the present time, one may also express serious doubts about the duty of admission as an obligation owed at large to the international community as

<sup>1</sup> *International Law* (3rd ed., 1957), vol. 1, p. 361.

<sup>2</sup> *International Law* (8th ed., 1955), vol. 1, pp. 645-6. See also the *Nottebohm* case, *I.C.J. Reports*, 1955, p. 4, *per* Judge Read, dissenting, at pp. 34, 47-8; *R. v. Secretary of State, ex parte Thakrar*, [1974] Q.B. 684; and the Solicitor-General in the debate on the Commonwealth Immigrants Bill 1968: 'Where one nation-State expels the citizens of another and the citizen presents himself at the frontiers of his own State, that State is bound by obligation to the expelling State to accept him': *Hansard*, H.C. Deb., vol. 759, col. 1581.

<sup>3</sup> Brownlie, *Principles of Public International Law* (2nd ed., 1973), p. 506.

<sup>4</sup> Plender, *International Migration Law* (1972), p. 74; Higgins, 'The Right in International Law of an Individual to enter, stay in and leave a Country', *International Affairs*, 49 (1973), pp. 341-57; *Patel et al. v. United Kingdom* (Application 4403/79), Decision of the European Commission on admissibility, October 1970.

<sup>5</sup> On the *actio popularis* see further, *South West Africa* cases (Second Phase), *I.C.J. Reports*, 1966, p. 5, especially at paras. 44, 49-51, 88; on the diplomatic protection of non-nationals see *Barcelona Traction* case, *I.C.J. Reports*, 1970, p. 3, at pp. 32, 37-8, 47.

<sup>6</sup> e.g. Article 5 (d), International Convention on the Elimination of All Forms of Racial Discrimination 1966; Article 12, International Covenant on Civil and Political Rights 1966; Articles 2, 3, Fourth Protocol, European Convention on Human Rights, 1950.

a whole. Of course, this does not mean that States may not agree among themselves to recognize such a right as incidental to obligations assumed within some regional organization.<sup>1</sup>

Although it might appear that international law limits the valid exercise of the power of expulsion to the expulsion of aliens, actual State practice is more equivocal. For example, in one case the Judicial Committee of the Privy Council ruled that whether or not the word 'deportation' was limited in its application to aliens was an open question, depending upon the construction of the particular statute in which it was found. Nationality *per se* was not a relevant consideration.<sup>2</sup> International law clearly permits the revocation of nationality in certain circumstances, but the governing principle is that a State may not manipulate its competence in order to avoid its international obligations. While, for example, fraud and misrepresentation commonly figure as grounds for the revocation of citizenship by naturalization<sup>3</sup> which are acceptable in international law, nevertheless, where denationalization takes place solely to give an air of legality to arbitrary expulsion, then it is merely one element of the wrongful conduct as a whole. Fischer Williams asserted<sup>4</sup> that, whereas positive international law does not forbid a State unilaterally to sever the relationship of nationality so far as the individual is concerned,

. . . still a State cannot sever the tie of nationality in such a way as to release itself from the international duty, owed to other States, of receiving back a person denationalized who has acquired no other nationality, should he be expelled as an alien by the State where he happens to be.<sup>5</sup>

In 1960, for example, it was said on behalf of Her Majesty's Government that no other State can be required to accept a stateless deportee, and that the power of deportation was not, therefore, available in a case in which a person's naturalization had been revoked following conviction for espionage offences.<sup>6</sup> The municipal act of deprivation of citizenship does not *per se* justify the subsequent application to the individual of the international measure of expulsion.<sup>7</sup>

<sup>1</sup> See Roberto Ago (Special Rapporteur), *Second Report on State Responsibility*, U.N. Doc. A/CN. 4/233: *Yearbook of the I.L.C.* (1970-II), p. 177, at pp. 184-6.

<sup>2</sup> *Co-operative Committee on Japanese Canadians v. Attorney-General for Canada*, [1947] A.C. 87, at p. 105; see also *Ebrahim Vazir v. State of Bombay*, [1954] A.I.R. (S.C.) 229, and cf. the exclusion provisions of the United Kingdom Prevention of Terrorism (Temporary Provisions) Act 1974, section 3 (substantially re-enacted in 1976).

<sup>3</sup> See British Nationality Act 1948, section 20.

<sup>4</sup> Brownlie, *Principles of Public International Law* (2nd ed., 1973), pp. 383-4, 391. See also *Oppenheimer v. Cattermole*, [1975] 2 W.L.R. 347, *per* Lord Cross of Chelsea at pp. 365-70; for comment on earlier stages in the proceedings, see Mann, *Law Quarterly Review*, 89 (1973), p. 194 and Merrills, *International and Comparative Law Quarterly*, 23 (1974), p. 143.

<sup>5</sup> 'Denationalisation', this *Year Book*, 8 (1927), p. 45 at p. 61. See also Schwarzenberger, *op. cit.* (above, p. 56 n. 1), vol. 1, p. 377.

<sup>6</sup> *Hansard*, H.C. Deb., vol. 606, col. 1176 (case of Klaus Fuchs), cited in 'Contemporary Practice—VIII', *International and Comparative Law Quarterly*, 9 (1960), pp. 253, 305.

<sup>7</sup> A suggestion to the contrary by Ghai in *Proceedings of the American Society of International Law*, 67 (1973), pp. 122, 126, is quite without authority, as indeed are a number of other assertions made in the course of discussion of 'Expulsion and Expatriation in International Law: The Right to Leave, to Stay and to Return'. On occasional resort to the sanction of exile by States, see Donnedieu de Vabres, *Traité élémentaire de droit criminel*, no. 613; Batiffol and Lagarde,



## II. THE TRADITIONAL VIEW OF THE POWER OF EXPULSION

The competence to expel is usually accepted by States, by international tribunals and by writers as the necessary concomitant of the State's powers in regard to the admission and exclusion of aliens.<sup>1</sup> It is frequently justified by reference to the public interests of the State and as an incident of sovereignty. In 1869, United States Secretary of State Mr. Fish observed:<sup>2</sup>

The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State are too clearly within the essential attributes of sovereignty to be seriously contested.

A successor to this office described the powers of exclusion and expulsion as 'incidents of sovereignty based on the fundamental right of self-preservation', and he inclined to the view that such rights could not be impliedly surrendered.<sup>3</sup>

Writers seem to be at one in agreeing that the power at least exists. Thus, Oda states the common view:<sup>4</sup>

The right of a State to expel, at will, aliens, whose presence is regarded as undesirable, is, like the right to refuse admission of aliens, considered as an attribute of sovereignty of the State. . . . The grounds for expulsion of an alien may be determined by each State by its own criteria. Yet the right of expulsion must not be abused.

The present edition of Oppenheim also accepts the general principle, but again suggests certain undefined limitations:<sup>5</sup>

Although a State may exercise its right of expulsion according to discretion, it must not abuse its right by proceeding in an arbitrary manner.

The idea of discretion, of freedom of decision within limits, is the subject of pertinent discussion by Schwarzenberger.<sup>6</sup> He concludes somewhat cautiously:<sup>7</sup>

It is arguable whether sovereign States have absolute discretion regarding the expulsion of foreigners or whether, in this respect, the minimum standard of civilization imposes limitations on the exercise of untrammelled domestic jurisdiction. However this may be, *within the limits in which international law permits the expulsion of foreigners*, this right involves the duty of the home State to receive its nationals.

*Droit international privé* (1970), Titre II, ch. 1, pp. 194-7; *The French Communards' case*, *British Digest of International Law*, vol. 6, pp. 231-2; *Hochmann's case*, 1899, *ibid.*, p. 235. More recent examples of the expulsion of citizens may be found in *Review of the International Commission of Jurists*, 14 (June 1975), pp. 3-8.

<sup>1</sup> See *Musgrove v. Chun Teeong Toy*, [1891] A.C. 272; *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Nottebohm case*, *I.C.J. Reports*, 1955, p. 4, *per* Judge Read, dissenting, at p. 46; *British Digest of International Law*, vol. 6, pp. 9-77; Hackworth, *Digest*, vol. 3, pp. 549-52, 690-707, 717 ff.

<sup>2</sup> Moore, *Digest*, vol. 4, p. 74; Whiteman, *Digest*, vol. 8, p. 620.

<sup>3</sup> Secretary of State Polk (1920), Hackworth, *Digest*, vol. 3, p. 692.

<sup>4</sup> Oda, 'The Individual in International Law', in Sørensen (ed.), *Manual of Public International Law* (1968), p. 469 at p. 482.

<sup>5</sup> *International Law* (8th ed., 1955), vol. 1, p. 611.

<sup>6</sup> Note the analogous role of discretion in nationality matters, discussed by Schwarzenberger, *International Law* (3rd ed., 1957), vol. 1, p. 359.

<sup>7</sup> *Ibid.*, p. 360, emphasis supplied. See also at p. 207 for a view of the international minimum standard transforming unlimited into limited territorial jurisdiction over aliens.

Thus, in the view of some writers at least, the power or competence to expel is to be seen not so much in terms of an absolute right, but rather as an exercise of controlled discretion. Expulsion requires justification, but although, as Oppenheim observes, an expelling State will hardly admit to not having just cause,<sup>1</sup>

... the borderline between discretion and arbitrariness, although elastic, is a real one, and in a case of doubt it is for an impartial organ to determine whether it has been overstepped.

### III. A DEVELOPED APPROACH TO THE POWER OF EXPULSION

#### I. DISCRETIONARY POWERS

With express reference to the *South West Africa* cases (Second Phase), Dr. Brownlie makes the point that no power is in the ultimate sense discretionary, since the very notion of power involves an idea of design, of a *defined* objective, purpose or competence.<sup>2</sup> A related, but somewhat different, approach has been suggested recently by K. C. Davis in his work *Discretionary Justice*.<sup>3</sup> The writer is concerned with discretion as it exists within a system of municipal law, but his views would seem to be of more general application. Thus, he proposes the desired objective of 'confining and structuring' discretion.<sup>4</sup> The governing premiss is that of control according to laws, rules and regulations. Such control is of two kinds: first, it sets the limits to the power in question, that is, it says what can and what cannot be done; secondly, it prescribes the manner of exercise of the power. A characterization of this nature is particularly suited for application to a variety of the powers of States in general, and especially to the power of expulsion.

There is nothing novel in this basic approach, which already has ample support in the jurisprudence of the World Court. For example, in the *Nationality Decrees* case, the Court noted that, wherever its international implications were concerned, 'jurisdiction which, in principle, belongs solely to the State is limited by rules of international law'.<sup>5</sup> Similarly, in the *Lotus* case, the Court qualified its reference to the 'wide measure of discretion' which a State enjoys regarding the extent of its jurisdiction by express mention of the limits which international law imposes.<sup>6</sup>

<sup>1</sup> *International Law* (8th ed., 1955), vol. 1, p. 693. See also *Zerman's case*, Moore, *International Arbitrations*, vol. 4, p. 3348; *Boffolo case*, *United Nations Reports of International Arbitral Awards*, vol. 10, p. 528; O'Connell, *International Law* (2nd ed., 1970), p. 705; Brownlie, *op. cit.* (above, p. 57 n. 4), pp. 505-6; Politis, *Recueil des cours*, 6 (1925-I), p. 5.

<sup>2</sup> Brownlie, *op. cit.* (above, p. 57 n. 4), pp. 462-3.

<sup>3</sup> *Discretionary Justice—A Preliminary Inquiry* (1971).

<sup>4</sup> Davis, *op. cit.* (previous note), pp. 55, 97. As they are used below, the words 'confining' and 'structuring' are employed to indicate the distinction between the two functions of legal rules which are (i) to set the limits and (ii) to prescribe the manner of exercise of a given power.

<sup>5</sup> *P.C.I.J.*, Series B, No. 4 (1921), pp. 23-4.

<sup>6</sup> *P.C.I.J.*, Series A, No. 10 (1927), p. 18. See also *Anglo-Norwegian Fisheries case*, *I.C.J. Reports*, 1951, p. 3, and, more recently, the recognition of a 'qualified right' to extend exclusive

The word 'discretion' and the phrase 'discretionary power' tend to be loosely employed and are ambiguous. They are commonly used to signify the incidence of uncontrolled freedom of choice between courses of action or inaction, and are often equated with arbitrary power and opposed to the ideal of the rule of law. While such a meaning in relation to certain powers may be justified by first impressions, it is the object of the present study to advance the developed characterization of discretionary powers set out above. 'Discretion' may then be seen to operate whenever the *legal limits* on a particular power permit freedom of choice between alternative courses of action. These legal limits may specify the courses of action which are available and may also indicate matters which require to be taken into account before a decision is made. There is, correspondingly, an absence of complete freedom in regard both to the decision, what is to be done, and to the manner in which that decision is to be reached. Certainly, a wide margin of appreciation may be conceded to the holder of the power, and this is frequently the case in regard to the power of expulsion. To that extent, the controls may be operative only at the outermost edges of an apparently absolute competence. Nevertheless, the task still remains, to determine with greater precision where the limits to the power may be found and what rules and standards govern its exercise. A first problem will be to consider the relation which exists between the State's discretionary powers over aliens and the so-called reserved domain of domestic jurisdiction.

## 2. ALIENS AND THE RESERVED DOMAIN OF DOMESTIC JURISDICTION

The entry and expulsion of aliens are matters traditionally located in the reserved domain of domestic jurisdiction. The presumption continues to be asserted in favour of the local State and in practice it will be seen that States enjoy a significant margin of appreciation in these areas.<sup>1</sup> However, the idea that the general field of competence is open to scrutiny and restriction is inherent in its nature as a concept, principally, of international law. It will be recalled that the Covenant of the League of Nations provided that claims based on domestic jurisdiction were to be tested by the criterion of international law, and not by political criteria.<sup>2</sup> Unlike that of the Charter of the United Nations, the proviso in the Covenant did not expressly exempt Members from the obligation to submit to the League disputes arising from matters which a Party considered to be within its domestic jurisdiction.<sup>3</sup> But, whether or not the present scope of Article 2 (7) of the Charter is identical with the rule established in general international law, it is clear that the domestic jurisdiction exception may be restricted in practice as a consequence of treaty obligations, as a result of the fishing zones in the Judgment of the Court in *Fisheries Jurisdiction* cases, *I.C.J. Reports*, 1974, p. 3. Cf. the conception of *jus aequum* in the terminology of Professor Schwarzenberger; see, for example, *International Law and Order* (1971), pp. 5, 6 and *passim*.

<sup>1</sup> *Ben Tillet's case*: *British Digest of International Law*, vol. 6, pp. 124-50, at p. 147; expulsions from Zambia: *British Practice in International Law*, 1966, p. 111; see also *ibid.*, 1967, pp. 112-13.

<sup>2</sup> Article 15 (8).

<sup>3</sup> *Nationality Decrees case*, *P.C.I.J.*, Series B, No. 4 (1923).



interpretations given to it by the organs of the United Nations, and by the progressive development of customary international law.

One example of the practical restriction of the sphere of domestic jurisdiction is to be found in a case which arose under the European Convention on Human Rights.<sup>1</sup> In its Second Memorial in preliminary proceedings to the *Belgian Linguistics* case, the European Commission argued that the domain reserved to national jurisdiction depends upon each State's international commitments. It is not absolute and not invariable, but is a relative notion which varies with the development of international law and the extent of obligations imposed and undertaken.<sup>2</sup> In support of its argument the Commission referred both to the *Nationality Decrees* case<sup>3</sup> and to Resolutions adopted in 1954 by the Institute of International Law.<sup>4</sup> It concluded its argument as follows:<sup>5</sup>

If States are . . . authorised by the Convention and Protocol to restrict the exercise of the rights and freedoms guaranteed where national security, the maintenance of order and the economic and fiscal spheres are affected, it seems reasonable to conclude that no field of governmental activity lies *a priori* outside the scope of the Convention, thus constituting a domain reserved to States.

The Commission also called attention to the fact that the Belgian Government had not exercised the option open to it of making express reservations under Article 64 of the Convention.

For its part, the Belgian Government argued that the complaints referred to the Court were not covered by the Convention and the Protocol, but formed part of the reserved domain of the Belgian legal order.<sup>6</sup> However, in its Judgment on this preliminary objection in 1967, the European Court of Human Rights unanimously rejected any possibility of resort to the notion of the reserved domain. It declared:<sup>7</sup>

. . . the Convention and Protocol which relate to matters normally falling within the domestic legal order of the Contracting States, are international instruments whose main purpose is to lay down certain international standards to be observed by the

<sup>1</sup> On the plea of domestic jurisdiction before international tribunals generally, see Waldock, this *Year Book*, 31 (1954), pp. 96–142; O'Connell, *International Law* (2nd ed., 1970), pp. 1082–4; Brownlie, *Principles of Public International Law* (2nd ed., 1973), pp. 289–90; *Peace Treaties* case, *I.C.J. Reports*, 1950, p. 65. See also the Court's treatment of the 'vital interests' argument in the *Fisheries Jurisdiction* case, *I.C.J. Reports*, 1973, p. 4 at pp. 19, 20.

<sup>2</sup> Second Memorial, Series B, p. 424 (14 July 1966).

<sup>3</sup> *P.C.I.J.*, Series B, No. 4 (1923).

<sup>4</sup> *Annuaire de l'Institut de droit international*, vol. 45, II, pp. 292, 293: 'Art. I: The reserved domain is the domain of State activities where the jurisdiction of the State is not bound by international law. The extent of this domain depends on international law and varies according to its development. Art. 3: The contracting of an international obligation in a matter within the reserved domain debar a party to that obligation from invoking the objection of the reserved domain with regard to any problem of interpretation or application of the obligation in question.'

<sup>5</sup> Second Memorial, Series B, p. 436.

<sup>6</sup> *Acts of the Court*, No. 5, Summary at p. 16. Cf. *Guardianship of Infants* case, *I.C.J. Reports*, 1958, p. 53; below, pp. 146–7.

<sup>7</sup> *Acts of the Court*, No. 5, p. 19. Cf. *Peace Treaties* case, *I.C.J. Reports*, 1950, p. 65 at pp. 70–1; Lauterpacht, *International Law and Human Rights* (1950), p. 174; see also the case against Greece: *Yearbook of the European Convention on Human Rights*, 12 (1969), p. 72; *International Legal Materials*, 7 (1968), p. 833.

Contracting States in their relations with persons under their jurisdiction . . . [The] jurisdiction of the Court extends to all cases concerning the interpretation and application of those instruments . . . [and] . . . the Court cannot in the circumstances regard the plea based upon the notion of the reserved domain as possessing the character of a preliminary objection of incompetence.

Apart from cases of inter-State treaties, where nations agree to surrender 'sovereign rights' in terms, it will always be difficult to establish legal principles applicable to the reserved domain. The example of the European Convention shows that the most significant developments are likely to result from regional arrangements, where States can be persuaded to limit the exercise of their rights in detail, by reference to the aims and purposes of a given treaty, and to submit themselves to the jurisdiction of an international tribunal.

Issues arising from the exercise of the power of expulsion are commonly affected by matters such as nationality and fundamental human rights. For this reason, any claimed presumption that expulsion is sealed within the reserved domain requires close scrutiny. Proposed grounds for rejecting such a presumption in relation to the treatment of aliens in general and the principle of non-discrimination in particular will now be examined more fully.

### 3. RULES AND STANDARDS

#### (a) *The bases of responsibility*

In 1927, de Boeck examined the problems raised by expulsion and concluded:<sup>1</sup>

L'expulsion sera légitime, lorsqu'elle aura pour objet d'assurer la conservation de l'état; elle sera illégitime, si elle n'est pas dictée par l'intérêt supérieur de l'association politique . . . La liberté d'expulsion n'est pas illimitée: pour être licite en droit international et pour exclure toute réclamation diplomatique, l'expulsion doit reposer sur de sérieux motifs, répondre à une véritable nécessité, et être exempte de toute rigueur inutile.

These words emphasize that the discretionary power of expulsion is limited by (1) its essential function, which is the protection of the State; (2) the requirement of reasonable cause, of sufficient justification; and (3) the requirement of an acceptable manner of execution. International law and municipal law both recognize the existence of these limiting factors and indicate the circumstances in which an excessive exercise of the power will invoke State responsibility.

When a State admits foreign nationals it is bound to extend to them the protection of its law and it assumes clear obligations concerning the treatment to be afforded them. Those obligations are owed, in the first instance, to the alien's State of nationality and, it has been argued, they derive from the consent of the States concerned. In his dissenting opinion in the *Nottebohm* case, Judge Read observed:<sup>2</sup>

By admitting the alien, the State, by its voluntary act, brings into being a series of legal relationships with the State of which he is a national. . . . The receiving State becomes subject to a series of legal duties *vis-à-vis* the protecting State, particularly

<sup>1</sup> *Recueil des cours*, 18 (1927-III), p. 447.

<sup>2</sup> *I.C.J. Reports*, 1955, p. 4 at p. 47.

the duty of reasonable and fair treatment. It acquires rights *vis-à-vis* the protecting State, particularly the rights incident to local allegiance and the right of deportation to the protecting State. At the same time the protecting State acquires correlative rights and obligations *vis-à-vis* the receiving State, particularly a diminution of its rights as against the individual resulting from the local allegiance, the right to assert diplomatic protection and the obligation to receive the individual on deportation. . . . The scope and content of the rights are . . . largely defined by positive international law.

In the case before him, Judge Read concluded that just such a relationship came into being between Guatemala and Liechtenstein on Nottebohm's admission to the former country after his naturalization in the latter. This relationship could not be brought to an end by the unilateral action of one of the States:<sup>1</sup>

It was open to Guatemala to terminate the position by deportation [of Nottebohm to Liechtenstein], but not to extinguish the right of Liechtenstein to protect its own national without the consent of that country.

The admission of aliens sets up a bilateral legal relationship and the resulting rights and obligations may operate as limits upon the power of expulsion.<sup>2</sup> Breach of any of these obligations, such as the duty to receive nationals duly expelled or to accord fair and reasonable treatment to aliens admitted, will involve the guilty State in international responsibility. That State will be placed in a situation where another State, or even some other subject of international law, enjoys either the right to claim reparation or the competence to impose a sanction.<sup>3</sup>

In a recent Report on State Responsibility, the Special Rapporteur to the International Law Commission observed:<sup>4</sup>

The different conceptions of responsibility nevertheless coincide in agreeing that every international wrongful act creates new legal obligations between the State committing the act and the injured State . . . The wrongful act is above all a breach of a legal duty, a violation of an obligation, and it is precisely this kind of act which the legal order considers . . . for the purpose of attaching responsibility.

Effort spent in the past on attempts to break down obligations in regard to aliens to a series of finite rules produced little.<sup>5</sup> States were divided by the controversy, by no means entirely extinct, between proponents of the international minimum standard and proponents of the standard of national treatment.<sup>6</sup>

<sup>1</sup> Ibid., p. 48. Cf. Judgment of the Court, *ibid.*, at p. 18.

<sup>2</sup> Other considerations, appertaining more closely to the issue of State succession, may apply in the case of a new State emerging with an alien minority already present on its territory. This factor, however, would scarcely justify the assumption of any absolute discretionary power; see further below, pp. 82-4, 117-18.

<sup>3</sup> Roberto Ago (Special Rapporteur), *Second Report on State Responsibility*, U.N. Doc. A/CN. 4/233: *Yearbook of the I.L.C.* (1970-II), p. 177, at p. 183.

<sup>4</sup> Ibid., pp. 184, 191.

<sup>5</sup> See the draft articles on State responsibility proposed by García-Amador and reaction thereto; summary in *First Report on State Responsibility* by Roberto Ago, U.N. Doc. A/CN. 4/217: *Yearbook of the I.L.C.* (1969-II).

<sup>6</sup> See, for example, Borchard, *Diplomatic Protection of Citizens Abroad* (1915); Cavaglieri, *Recueil des cours*, 26 (1929-I), p. 213; Verdross, *Recueil des cours*, 37 (1931-II), p. 353 and *Les*



Latterly, in discussion of the general issue of such standards, two tendencies have been especially apparent in the practice of States. The first reflects the keen desire of many States to see further developments within the field of human rights; the second is to be seen in the continuing and vociferous insistence upon permanent sovereignty over natural resources. In this second area, in particular, the institution of diplomatic protection has been strongly attacked by traditional and newly recruited adherents to the Calvo doctrine.<sup>1</sup> In matters of so-called 'wealth deprivation',<sup>2</sup> the principle of national treatment is firmly entrenched, with an increasing number of States now insisting that disputes relating to nationalization measures fall to be considered by local courts alone.<sup>3</sup> It may be that, in the future, while the foreign national will benefit from the generality of human rights standards, he will no longer enjoy that security of property which was so often and successfully insisted upon in the past. For the present, it remains necessary to examine not only the mechanics of the power of expulsion, but also the extent of influence exerted by developments in human rights standards; in this way light may be shed on the circumstances in which the exercise of power amounts to the breach of an international obligation.

(b) *The development of human rights standards*

It was only in the mid-sixties that some success was achieved in securing a broader based and more elaborate recognition of certain kinds of basic rights and freedoms. In 1965, the General Assembly adopted the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>4</sup> the importance of which lay in its enunciation of a principle of non-discrimination which had been developing over the years.<sup>5</sup> Article 1 of the Convention defines racial discrimination<sup>6</sup> as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

*règles internationales concernant le traitement des étrangers* (1932); Kaufmann, *Recueil des cours*, 57 (1935-IV), p. 427; Roth, *Minimum Standard of International Law applied to Aliens* (1949); Calvo, *Le Droit International* (5th ed.), vol. 6, p. 231; Montevideo Convention on the Rights and Duties of States 1933, Art. 9 (*League of Nations Treaty Series*, vol. 165, p. 19); Whiteman, *Digest*, vol. 8, pp. 885-6; García-Amador, *Third Report on State Responsibility*, *Yearbook of the I.L.C.* (1958-II); *Sixth Report*, *ibid.* (1961-II).

<sup>1</sup> See the Separate Opinions of Judges Padilla Nervo and Ammoun in the *Barcelona Traction* case, *I.C.J. Reports*, 1970, p. 3 at pp. 247, 294.

<sup>2</sup> See Lillich, 'The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law under Attack', *American Journal of International Law*, 69 (1975), 359 at p. 360 note 11, for the meaning of wealth deprivation.

<sup>3</sup> See Lillich, *loc. cit.* (previous note), for a discussion of UNCTAD Res. 88 (XII), U.N. General Assembly Res. 3171 (XXVIII) and, in particular, Article 2 (2) (c) of the Charter of Economic Rights and Duties 1974.

<sup>4</sup> *United Kingdom Treaty Series*, No. 77 (1969) (Cmd. 4108). By August 1976 this Covenant had received some eighty-nine ratifications and accessions.

<sup>5</sup> See Schwelb, *International and Comparative Law Quarterly*, 15 (1966), pp. 996-1059; Vierdag, *The Concept of Discrimination in International Law* (1973).

<sup>6</sup> On alienage as a sufficient ground for discrimination, see further below, pp. 73-7.

Yet this broad statement of principle is at once followed by an exception clause providing that the Convention is not to apply to distinctions, exclusions, etc., which a State party may make between citizens and non-citizens.<sup>1</sup> Clearly, however, this exceptional privilege of the State to differentiate between the national and the alien would not justify what was effectively a policy of racial discrimination. While certain rights, such as the right to participate in elections and to vote,<sup>2</sup> will be limited to nationals, the one fundamental rule contained in Article 6 is to be applied without distinction. This rule requires States parties to assure to *every one within their jurisdiction* effective protection against acts of racial discrimination.

(c) *The 1966 Covenants*

In 1966, the General Assembly adopted two instruments of wider import, namely, the Covenant on Economic, Social and Cultural Rights, and the Covenant on Civil and Political Rights.<sup>3</sup> Both these Covenants had received the necessary thirty-five ratifications by late 1975, and they entered into force in the early part of 1976. It can be assumed that their influence will be increasingly felt, but it may still be a matter for debate to what extent the Covenants can be said to reflect, or even to crystallize, existing rules of general international law. For the moment they may continue to represent only desirable standards,<sup>4</sup> although there is much to be said for the view which sees them as 'authoritative evidence of the content of the concept of human rights as it appears in the Charter of the United Nations'.<sup>5</sup>

Both Covenants are incidentally relevant to the treatment of aliens and certain of their provisions will be briefly examined. For example, Article 2 (2) of the Covenant on Economic, Social and Cultural Rights declares that States parties undertake to guarantee that the various rights set out will be exercised without discrimination of any kind, including 'birth or other status'. This would appear to be wide enough to limit the number of grounds justifying discrimination against aliens, but the following paragraph provides:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.

This provision was the object of a certain hostility from the United States, which advanced the view that it was contrary to many existing treaties and inconsistent with generally recognized principles of international law.<sup>6</sup> While there is some weight behind this argument, the tendencies which it seeks to

<sup>1</sup> Article 1 (2).

<sup>2</sup> Article 5 (c).

<sup>3</sup> *Parliamentary Papers*, Misc. No. 4 (1967) (Cmnd. 3220).

<sup>4</sup> Cf. Robertson, *Human Rights in the World* (1972), pp. 33-4.

<sup>5</sup> Brownlie, *Basic Documents in International Law* (2nd ed., 1972), p. 150; O'Connell, *International Law* (2nd ed., 1970), p. 747.

<sup>6</sup> Whiteman, *Digest*, vol. 8, p. 378. Compare Article 2, Charter of Economic Rights and Duties of States 1974, and note the amendment to that Article proposed by the United States and the United Kingdom, among others: *International Legal Materials*, 14 (1975), pp. 253, 262.

oppose are now fairly well established, for example, in numbers of General Assembly Resolutions.<sup>1</sup>

Objections of a different kind may be raised to Article 4, which permits States to apply certain restrictions to the exercise of rights generally. It declares that rights may be made subject to

such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Permissible grounds for derogation of this nature are so vague as to be nearly meaningless. While the 'general welfare in a democratic society' may embrace those matters often described in terms of national security, *ordre public*, and public health,<sup>2</sup> the provisions of the Covenant make no attempt either to be more specific or to introduce an element of objectivity.<sup>3</sup>

Apart from Article 2 (3) considered above, no special limitation upon the rights of foreign nationals is apparent in other articles of the Covenant. These recognize, for example, the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts,<sup>4</sup> and the right of everyone to the enjoyment of just and favourable conditions of work.<sup>5</sup> The framing of these provisions suggests that, while Article 2 (3) imposes no obligation upon States to permit aliens to work within their jurisdiction, if such privilege is granted, then they must be treated according to the same standard as is applicable to nationals.

It is the Covenant on Civil and Political Rights, however, which is perhaps most relevant to the status of aliens. Article 2 (1) declares:<sup>6</sup>

Each State Party . . . undertakes to respect and to ensure to *all individuals within its territory, and subject to its jurisdiction* the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, *birth or other status*.

This is clearly wider and more explicit than the provision contained in Article 2 (2) of the first-mentioned Covenant. Article 4 (1) goes on to enlarge on the prohibition against any form of discrimination, with particular reference to the permitted measures of derogation:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties . . . may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with

<sup>1</sup> See General Assembly Resolution 1803 (XVII) of 1962 on Permanent Sovereignty over Natural Resources; Resolution 3281 (XXIX) of 1974, adopting the Charter of Economic Rights and Duties.

<sup>2</sup> See Inglés, *Study of Discrimination in respect of the Right of Everyone to leave any Country, including his own, and to return to his Country*: U.N. Doc. E/CN.4/Sub.2/229/Rev. 1 (1963), pp. 36-7.

<sup>3</sup> On the inherent limits to such terms, see further below, pp. 96-7, 142, 146-52.

<sup>4</sup> Article 6.

<sup>5</sup> Article 7.

<sup>6</sup> Emphasis supplied. Compare Article 1, European Convention on Human Rights.



their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin.

The anti-discrimination provision here is not so widely drawn as that in Article 2 (1) above, but measures taken against a particular class of aliens which is determinable solely by reference to race or colour would not be justified.<sup>1</sup> In addition, the measures of derogation must be consistent with a State's other obligations under international law. It is to be remarked that Article 4 (2) expressly forbids any derogation from those provisions which guarantee the right to life,<sup>2</sup> or which forbid torture or inhuman treatment,<sup>3</sup> slavery, servitude,<sup>4</sup> conviction or punishment under retroactive laws,<sup>5</sup> and also those articles which guarantee the right to recognition as a person before the law<sup>6</sup> and the right to freedom of thought, conscience and religion.<sup>7</sup>

The content of the articles which follow elaborates many of the rights and freedoms first set out in the Universal Declaration, and to a certain extent reflects the principles already incorporated in the European Convention. Thus, Article 9 declares the right of every one to liberty and security of the person, and to freedom from arbitrary arrest and detention. Article 10 prescribes that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Article 12 calls for freedom of movement for everyone lawfully within the territory of a State, and for the right to leave any country. Emphasis is also placed on the fact that, while these rights may be restricted, the power of the State in the matter is essentially discretionary and confined by reference to its purpose and to the requirement that decisions be taken according to law.

Further rights are set out in subsequent articles, which include the right of aliens not to be arbitrarily expelled,<sup>8</sup> the right to equality before courts and tribunals,<sup>9</sup> the right to privacy, honour and to reputation,<sup>10</sup> and the right of the family to protection by the State.<sup>11</sup> The content of Article 26 is becoming increasingly familiar:

All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

So it is that the limitations on the competence of States generally may also confer specific benefits upon the alien.

Nevertheless, some caution remains necessary in the evaluation of these

<sup>1</sup> On the expulsions from Uganda in 1972, see below, pp. 82-4.

<sup>2</sup> Article 6.

<sup>3</sup> Article 7.

<sup>4</sup> Article 8 (1), (2).

<sup>5</sup> Article 15; also Article 11, which prohibits imprisonment solely for inability to fulfil a contractual obligation.

<sup>6</sup> Article 16.

<sup>7</sup> Article 18.

<sup>8</sup> Article 13.

<sup>9</sup> Article 14 (1).

<sup>10</sup> Article 17 (1).

<sup>11</sup> Article 23 (1). The rights in question are more in the nature of qualified, rather than absolute, rights; see Marshall, 'Rights, Options and Entitlements', *Oxford Essays in Jurisprudence*, ed. Simpson, Second Series (1973), 228-41.

recent conventional provisions, bearing in mind the approach adopted by the International Court of Justice in the matter of ratifications of the Geneva Convention on the Continental Shelf.<sup>1</sup> The Covenants are now in force, but it may be that the details of the provisions in question still fail to qualify as rules of customary international law. But the agreements do serve, at the very least, as a most important source of standards, in the sense of indicating the content of the general obligations accepted by States parties to the Charter of the United Nations.<sup>2</sup>

(d) *The status of human rights in general international law*

It is no longer necessary to appeal to natural law in order to support the proposition that basic human rights are established within the realm of positive international law.<sup>3</sup> In its recent decision in the *Barcelona Traction* case the International Court of Justice referred to a category of international obligations which are owed towards the community of States as a whole:<sup>4</sup>

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

The Court observed that some of these obligations will derive from general international law, while others spring from international instruments of a universal or quasi-universal character.<sup>5</sup> However, much remains to be done if any coherent theory is to emerge from these dicta. Certainly, the prohibition on genocide may now be located within the area of law referred to as *jus cogens*, or international public policy,<sup>6</sup> from which no derogation is permitted. Implicit in the prohibition, of course, is the idea of universality, so that, to take an extreme example, no programme of genocide could be justified on the basis of a distinction drawn between nationals and aliens.

The status of other rules relating to fundamental human rights is not so clear. The Court itself referred to protection from slavery, in respect of which

<sup>1</sup> *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, p. 3, paras. 26, 73; see further below, p. 69.

<sup>2</sup> On the question of applying human rights standards, see the dissenting judgment of Judge Jessup in the *South West Africa* cases (Second Phase), *I.C.J. Reports*, 1966, p. 5 at p. 441; *Advisory Opinion on Namibia*, *I.C.J. Reports*, 1971, p. 16 at p. 57.

<sup>3</sup> Cf. Dissenting Opinion of Judge Tanaka in the *South West Africa* cases (Second Phase), *I.C.J. Reports*, 1966, p. 5 at p. 297. See also Inglés, *Study of Discrimination in respect of the Right of Everyone to leave any Country, including his own, and to return to his Country*, loc. cit. (above, p. 66 n. 2), pp. 1-4, where the right under study is said to be founded on natural law.

<sup>4</sup> *I.C.J. Reports*, 1970, p. 3 at p. 32.

<sup>5</sup> Note also the impact of regional instruments, such as the European and American Conventions on Human Rights.

<sup>6</sup> See Articles 53, 64, Vienna Convention on the Law of Treaties 1969; Brownlie, *Principles of Public International Law* (2nd ed., 1973), pp. 499-502; cf. O'Connell, *International Law* (2nd ed., 1970), pp. 244-5; Schwarzenberger, *Texas Law Review*, 43 (1965), pp. 455-78 and *International Law and Order* (1971), ch. 4; Verdross, *American Journal of International Law*, 60 (1966), pp. 55-63.

there is a long history of international action and agreement,<sup>1</sup> and to the prohibition of racial discrimination. It is to be remarked that both these rights figure in conventions among those from which no derogation is permitted, even in exceptional circumstances.<sup>2</sup> If this criterion of 'no derogation' is applied to the rights enumerated generally in international conventions, then three other rights stand out as future candidates for inclusion within a category of *jus cogens*. These are the right to life, in so far as the individual is protected against 'arbitrary' deprivation of life;<sup>3</sup> the right to be protected against torture, cruel or inhuman treatment or punishment; and the right not to be subjected to retroactive criminal penalties.<sup>4</sup> Additionally, one may propose the right of everyone to be recognized as a person before the law,<sup>5</sup> a right sometimes expressed indirectly, in terms of the right of everyone to an effective remedy, coupled with the rule of non-discrimination.<sup>6</sup>

Now whether general international law requires the protection of any of these rights remains an open question. Certainly they are included within the provisions of many international instruments, and are reflected also in national legal systems. This latter fact is by no means conclusive evidence of a sufficient *opinio juris*, although it does perhaps indicate the limits to what States seek to claim for themselves. Similarly, the mere fact that rights are included in international covenants is not conclusive evidence of the status of those rights within the body of international law. In the *North Sea Continental Shelf* cases in 1969 the International Court of Justice confirmed that treaty rules might well emerge as rules of customary international law. But its judgment is a model of caution and strongly advises against the making of any general assumptions in the matter. In this case, the 'equidistance/special circumstances' principle for delimiting the continental shelf failed to meet the three criteria held to be essential to the process. The Court found that Article 6 was not essentially norm-creating,<sup>7</sup> that the number of States participating in the Convention, although respectable, was hardly sufficient,<sup>8</sup> and finally, that subsequent State practice did not provide conclusive evidence of an *opinio juris sive necessitatis*. Earlier in its judgment the Court had also observed that there was both a positive law and a fundamentalist

<sup>1</sup> See Slavery Convention 1926: *League of Nations Treaty Series*, vol. 60, p. 253; Protocol 1953: *United Nations Treaty Series*, vol. 212, p. 17; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery 1956: *ibid.*, vol. 266, p. 3; I.L.O. Convention concerning Forced or Compulsory Labour 1930: *ibid.*, vol. 39, p. 53; I.L.O. Convention concerning the Abolition of Forced Labour 1957: *ibid.*, vol. 320, p. 291; Universal Declaration of Human Rights, Article 4; Covenant on Civil and Political Rights, Article 8; European Convention, Article 4; American Convention, Article 6.

<sup>2</sup> e.g. European Convention, Article 15 (2); Covenant on Civil and Political Rights, Article 4; American Convention, Article 27.

<sup>3</sup> The inadequacy of this description is manifest.

<sup>4</sup> European Convention, Article 15 (2); Covenant on Civil and Political Rights, Article 4; American Convention, Article 27.

<sup>5</sup> Covenant on Civil and Political Rights, Article 16; American Convention, Article 3.

<sup>6</sup> Cf. European Convention, Articles 13 and 14.

<sup>7</sup> Article 6 refers in the first place to delimitation by agreement.

<sup>8</sup> At the date of judgment the Convention had been in force for five years and had received thirty-nine ratifications and accessions. By 1974, the number of Parties had increased to fifty-three.



aspect to the arguments advanced by Denmark and the Netherlands. The former was supported by reference to the work already done in the field of delimitation by international legal bodies, to State practice and to the influence of the Geneva Convention. The fundamentalist aspect related to the so-called 'natural law' of the continental shelf, and looked to equidistance as having the *a priori* character of a legal norm.<sup>1</sup> Very similar arguments can be mustered in support of human rights standards and in support of the view that international covenants have merely reflected or crystallized existing norms of customary international law. The Court also noted that Article 6 of the Continental Shelf Convention was one of those provisions open to reservation; it observed:<sup>2</sup>

this cannot be so in the case of general or customary rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of unilateral exclusion exerciseable at will by any one of them in its own favour.

A further analogy may here be drawn between the privilege of a State to make reservations to certain terms of a treaty, and its privilege to derogate from certain obligations in human rights conventions. Where reservation or derogation is barred, then this may support a finding that a treaty stipulation embodies or crystallizes a pre-existing or emergent rule of customary international law.

However, it is no straightforward matter to apply the general principles favoured by the Court to the human rights and fundamental freedoms now set out, for example, in the Covenant on Civil and Political Rights. Problems derive not only from the difference in the nature of the subject-matter, but also from the absence of an effective basis of responsibility. While some recognition has been extended to human rights over very many years, their role in raising the individual to the level of subject of international law is comparatively new, as is their reduction to a set of finite rules. The Racial Discrimination Convention has been widely ratified,<sup>3</sup> but States have adopted a more cautious approach to the two 1966 Covenants.<sup>4</sup> This may suggest a desire on their part to adhere to the *prima facie* exclusive authority over territory and inhabitants which seems to follow from theories of sovereignty and the doctrine of the reserved domain.

Nevertheless, today there can be little doubt that acts of genocide or the implementation of a policy of racial discrimination are unlawful; they affect the interests of other States and also constitute matters of international concern sufficient to justify action by organs of the United Nations. As the corpus of human rights law builds up, the detailed provisions of recent conventions will move into the foreground, to impose specific obligations upon States. During

<sup>1</sup> *I.C.J. Reports*, 1969, p. 3 at p. 28.

<sup>2</sup> *Ibid.*, pp. 38-9. See also Padilla Nervo, Separate Opinion, at p. 98; but note Baxter, *Recueil des cours*, 129 (1970-I), pp. 48-51.

<sup>3</sup> By August 1976 eighty-nine States had ratified or acceded to the International Convention for the Elimination of All Forms of Racial Discrimination.

<sup>4</sup> By August 1976 forty-eight States had ratified or acceded to the Covenant on Economic, Social and Cultural Rights and thirty-five States to the Covenant on Civil and Political Rights. In addition, twelve States had subscribed to the Optional Protocol to the Civil and Political Rights Covenant.

this evolutionary period, however, there can be little doubt that such detailed provisions will continue to indicate the content of *general* obligations already assumed by States,<sup>1</sup> and to set out standards of treatment to be accorded to both nationals and aliens. An example of this slow but progressive limitation of States' powers is evident in the history and development of the principle of non-discrimination.

#### 4. ALIENS AND THE PRINCIPLE OF NON-DISCRIMINATION

##### (a) *The principle of non-discrimination*

The principle or norm of non-discrimination has figured prominently in all recent attempts to secure the better protection of fundamental human rights. Rights such as the right to life, liberty and security of the person, and the right to equality before, and equal protection of, the law, clearly allow for no distinction between nationals and aliens. Yet it is apparent that both general international law and recent conventions anticipate continued distinctions between these two groups.<sup>2</sup> The 'basic rights' of the alien may be assured, but it is unclear to what extent his other rights and interests can be restricted. While it can be argued that non-discrimination as a general principle or rule is confined to distinctions drawn on the basis of race alone, there is now considerable evidence for the view that, as a standard of international law, non-discrimination is drawn on a wider scale.<sup>3</sup>

International instruments most frequently define discrimination in terms of some exclusion or restriction, or alternatively as some privilege or preference, which operates to nullify the particular rights which it is intended to entrench. As an element in many theories of justice, the principle of equality imposes upon those who wish to treat individuals differently the duty of showing cause for such differential treatment.<sup>4</sup> Such a formal approach to the character of justice offers little guidance to the necessary content of that concept and, by itself, suggests few restrictions upon those grounds which may be raised to support inequalities. Justice itself may not be equality alone,<sup>5</sup> and a distinction must be maintained between what has been described as<sup>6</sup>

the concept of justice as meaning a proper balance between competing claims [and]

<sup>1</sup> For example, by way of Articles 55 and 56 of the United Nations Charter.

<sup>2</sup> e.g. Article 1 (2), International Convention on the Elimination of All Forms of Racial Discrimination 1966; Article 2 (3), Covenant on Economic, Social and Cultural Rights 1966; Articles 13 and 25, Covenant on Civil and Political Rights 1966.

<sup>3</sup> See Convention on the Political Rights of Women 1953; Declaration on Elimination of Discrimination against Women 1967; Draft Convention on the Elimination of All Forms of Religious Intolerance 1967.

<sup>4</sup> Ginsberg, *On Justice in Society* (1965), pp. 11, 42. Equality, be it of rights or treatment, is here employed as equivalent to non-discrimination.

<sup>5</sup> See the criticism of Aristotle's formal description (following Plato, *Laws*, bk. VI, p. 757) in Lucas, *The Principles of Politics* (1966), pp. 242 et seq. See also Rawls, *A Theory of Justice* (1972), at pp. 507 et seq.

<sup>6</sup> Rawls, *op. cit.* (previous note), p. 10, emphasis supplied. Ginsberg similarly refutes discrimination based on 'irrelevant differences' (*op. cit.* (above, n. 4), pp. 57, 58), and Lucas also on 'irrelevant distinctions' (*op. cit.* (previous note), pp. 238-9).

a conception of justice as a set of related principles for identifying the *relevant considerations* which determine the balance.

It is to the content of these principles that one must look in order to obtain the assurance of equality.<sup>1</sup>

Discrimination is not synonymous with differential treatment. As the concept is employed in international law, its meaning implies distinctions which are unfair, unjustifiable or arbitrary.<sup>2</sup> From Judge Tanaka's judgment in the *South West Africa* cases and from that of the European Court of Human Rights in the *Belgian Linguistics* case certain propositions emerge. Differential treatment is not unlawful (1) if the distinction is made in pursuit of a legitimate aim;<sup>3</sup> (2) if the distinction does not lack an 'objective justification'; and (3) providing that a reasonable proportionality exists between the means employed and the aims sought to be realized. Whether or not there is discrimination will thus depend upon a consideration of all the relevant circumstances,<sup>4</sup> and these propositions amplify and complement the definitions of discrimination most usually found in international instruments and local laws.

A recent municipal case of note is the decision of the Judicial Committee of the Privy Council in *Akar v. Attorney-General of Sierra Leone*.<sup>5</sup> The Board was faced with a constitutional amendment which purported to restrict citizenship to persons 'of negro African descent'. It was conceded in argument that the adoption of the word 'negro' involved a description by race, and the question was whether the amendment offended against the constitutional guarantees of fundamental rights and non-discrimination.<sup>6</sup> The Constitution permitted exceptions to and restrictions on these rights which were reasonably justifiable

<sup>1</sup> See the positive approach of the Permanent Court of International Justice in *Minority Schools in Albania* case, *P.C.I.J.*, Series A/B, No. 64 (1935); *German Settlers in Poland* case, *P.C.I.J.*, Series B, No. 6 (1923). See also the dissenting opinion of Judge Tanaka in *South West Africa* cases (Second Phase), *I.C.J. Reports*, 1966, p. 6 at pp. 284-316; Article 14, European Convention on Human Rights; Application 104/55: *Yearbook of the European Convention on Human Rights*, 1 (1958), p. 228; Application 511/59: *ibid.*, 3 (1960), p. 394 (*Gudmundsson v. Republic of Iceland*, 1960, in which differential treatment was upheld); Application 2299/64: *ibid.*, 10 (1967), p. 626 (*Grundrath v. Federal Republic of Germany*, in which the Commission proposed and adopted an independent role for Article 14); *Belgian Linguistics* case, *Report of the Commission*, 24 June 1965, especially paras. 400, 401, 405, 425 and *Judgment of the European Court of Human Rights*, 23 July 1968; Eissen, 'L'autonomie de l'Article 14 de la Convention Européenne des droits de l'homme dans la jurisprudence de la Commission', in *Mélanges offerts à Polys Modinos* (1968), pp. 122-45.

<sup>2</sup> McKean, 'The Meaning of Discrimination in International and Municipal Law', this *Year Book*, 44 (1970), p. 177. For criticisms of the definition adopted in the United Kingdom Race Relations Act 1968, see Hepple, *Race, Jobs and the Law in Britain* (2nd ed., 1970), pp. 42-8, 49-57, 85-111.

<sup>3</sup> Note the differential treatment ('positive discrimination') which is permitted by Article 1 (4) of the International Convention on the Elimination of All Forms of Racial Discrimination 1966. A recent suggestion that certain governments may not be bound by international standards of non-racial treatment because that would be 'unfair' (Ghai, *Proceedings of the American Society of International Law*, 67 (1973), p. 125), receives no support from the Convention.

<sup>4</sup> *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory*, *P.C.I.J.*, Series A/B, No. 44 (1932), at p. 28.

<sup>5</sup> [1970] A.C. 853.

<sup>6</sup> Sections 11, 23 (3), Constitution of Sierra Leone.



in a democratic society. The Board, however, doubted whether the imposition of a disability on the ground that someone's father or paternal grandfather were not 'negroes of African descent' was something which, having regard to its nature, was reasonably justifiable.<sup>1</sup> The majority of the Board noted that<sup>2</sup>

to justify . . . making discriminatory legislation not only must the disability be of itself of a nature that makes it reasonably justifiable but there must also be 'special circumstances pertaining' to the persons subjected to the disability which make the legislation reasonably justifiable in a democratic society. . . . If (the Constitution) provides that no law shall make any provision which treats some people differently from others merely because of differences in race it cannot be that such differences in race would alone constitute 'special circumstances' pertaining to those being treated differently. The special circumstances would have to be additional to the differences of race (or of tribe or of place of origin or political opinions or colour or creed as the case may be). . . . The only circumstance which was to exclude those who . . . had already become citizens was that they could not satisfy a description which was essentially a description by race. The Board held that this new condition of citizenship, being an essentially racial one, offended the letter and flouted the spirit of the Constitution. It could not be justified as a lawful discrimination in the light of today's standards,<sup>3</sup> which demand that the 'pith and substance' of the legislation or measures in question be submitted to a close scrutiny.

#### (b) *Discrimination on the basis of nationality*

In developing his conclusion that the norm of non-discrimination had become a rule of customary international law, Judge Tanaka observed that the concept of equality before the law and equal protection of the law was a feature common to many constitutions.<sup>4</sup> This fact alone is some evidence of the acceptance of equality as a general principle of law, and it is additionally remarkable that many States do guarantee fundamental rights without distinction between citizens and aliens.<sup>5</sup>

It has been seen that modern covenants and conventions tend to propose three

<sup>1</sup> [1970] A.C. 853, 865. Cf. *Guinn and Beal v. U.S.*, 238 U.S. 347.

<sup>2</sup> [1970] A.C. 853, pp. 865-6. Lord Guest dissented on the ground that an Act dealing with citizenship was, by that fact alone, reasonably justifiable in a democratic society: *ibid.*, pp. 871-2.

<sup>3</sup> Compare the decision to the opposite effect in *Pillai v. Mudanayake*, [1953] A.C. 514, upholding legislation which barred a large number of Indian Tamils from becoming citizens of Ceylon because neither their fathers nor their grandfathers were born there; see especially the view of the Board expressed at p. 530. For eventual agreement between India and Ceylon regarding the status of the Indian Tamils, see *Indian Journal of International Law*, 4 (1964), pp. 522-6, 637-40; for an indication of subsequent events, see the *Guardian*, 24 February 1975.

<sup>4</sup> *I.C.J. Reports*, 1966, at p. 300. Equality as a norm of general international law was also accepted by Judge Wellington Koo (*ibid.*, p. 234) and Judge Padilla Nervo (*ibid.*, pp. 455, 464-8). Peaslee, *Constitutions of the Nations* (1965), vol. 1, p. 7, estimates that some 75 per cent. of the world's constitutions acknowledge the principle of equality.

<sup>5</sup> See, for example, the availability of *habeas corpus* in the law of the United Kingdom and the United States: *R. v. Secretary of State, ex parte Soblen*, [1963] 1 Q.B. 829; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893); United States Constitution, Article I (1) (9). The remedy is, however, limited to alien friends: *Netz v. Chuter Ede*, [1946] Ch. 224; *R. v. Bottrill, ex parte Küchenmeister*, [1947] K.B. 41; *Ludeck v. Watkins*, 335 U.S. 160 (1941). See also Article 3, Constitution of the Federal Republic of Germany; Articles 14 and 15, Constitution of the Republic of India; De Smith, *The New Commonwealth and its Constitutions*, pp. 183 et seq.

distinct elements as incidents of unlawful discrimination. There must be (1) a distinction, exclusion, restriction or preference, which is (2) based on one or more of the specified grounds, such as race, colour or religion, and which (3) has the purpose or effect of nullifying or impairing the enjoyment or exercise on an equal footing of the rights and freedoms which are guaranteed. Yet despite the general wording of recent conventions, discrimination which is based on nationality alone may still be permissible, at least within certain limits.<sup>1</sup> For example, the State's duty to admit individuals is usually limited in favour of those who are its nationals, and it is widely accepted that aliens may be barred from the exercise of political rights,<sup>2</sup> the ownership of certain property and the holding of public office.<sup>3</sup> State practice supports the lawfulness of such discriminations,<sup>4</sup> although there is a tendency for States to accord each other's nationals greater equality in fact, as a result of extensive treaty obligations. The disadvantages of alienage were significantly reduced through the development of the standards of most-favoured-nation and national treatment in the commercial treaties of the seventeenth century and onwards,<sup>5</sup> and here in the underlying principle of equality lie the origins of the norm of non-discrimination. Even in the absence of treaty, certain measures which discriminated against foreigners alone were unacceptable. In matters of taxation, for example, the view generally held was that the alien was liable 'in the manner and to the same extent as the native subjects'.<sup>6</sup> Such a rule readily follows from the principle that the alien is subject to the laws of the State in which he is resident.<sup>7</sup> But, as Phillimore noted in 1855:<sup>8</sup>

<sup>1</sup> Note the exclusion of nationality from the generic term 'national origins' by the House of Lords in *London Borough of Ealing v. Race Relations Board*, [1972] A.C. 342. Compare the similar result in *Espinoza v. Farah Manufacturing Co. Inc.*, 94 S. Ct. 334 (1973), Douglas J. dissenting at pp. 340 et seq.

<sup>2</sup> Batiffol and Lagarde, *Droit international privé* (1970), p. 198, citing Domat. See also proposals for franchise reform in Aden, in *British Practice in International Law*, 1964-I, at pp. 66-7; Article 16, European Convention on Human Rights.

<sup>3</sup> For example, no alien may own a British ship: Status of Aliens Act 1914, section 17; nor may he generally take Crown employment: Aliens Employment Act 1955. Cf. *In re Griffiths*, 93 S. Ct. 2851 (1973); *Sugarman v. Dougal*, 93 S. Ct. 2842 (1973).

<sup>4</sup> See *Mrs. Stevenson's case* (landholding), *British Digest of International Law*, vol. 6, pp. 327-8; *Grant's case* (exercise of certain trades), *ibid.*, pp. 328-9; *Mrs. Thompson's case* (establishment of schools), *ibid.*, p. 329.

<sup>5</sup> See treaties cited in *British Digest of International Law*, vol. 6, at pp. 330-2; Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648-1815)* (1971), pp. 97-8, 110-13.

<sup>6</sup> *British Digest of International Law*, vol. 6, pp. 405, 406, 408; case involving the Treaty with Colombia of 1825: *ibid.*, p. 333. It has also been suggested that if alien property is included within nationalization measures while national property is excluded, then this may be a discrimination prohibited by international law; see White, *The Nationalization of Foreign Property* (1961), ch. 6; *Anglo-Iranian Oil Co. case*, I.C.J. Pleadings, pp. 93-7. But compare Covenant on Economic, Social and Cultural Rights 1966, Article 2 (3); Charter of Economic Rights and Duties 1974, Article 2; *Gudmundsson v. Iceland: Yearbook of the European Convention on Human Rights*, 3 (1960), p. 394.

<sup>7</sup> Cf. case involving the Colombian transit tax on mail: *British Digest of International Law*, vol. 6, pp. 414-18; case concerning the Treaty with Brazil of 1827: *ibid.*, p. 419; Albrecht, 'Taxation of Aliens in International Law', this *Year Book*, 29 (1952), pp. 145, 172. On 'confiscatory taxation', see *British Practice in International Law*, 1964-II, pp. 202-6.

<sup>8</sup> *Commentaries on International Law* (1st ed., 1855), vol. 2, s. 2, cited in *British Digest of*



Foreigners, whom a State has once admitted unconditionally into its territories, are entitled not only to freedom from injury, but to the execution of justice in respect of their transactions with the subjects of that State. No State has a right to set, as it were, a snare for foreigners . . .

In the past, the right of access to the courts was commonly granted to aliens by treaty,<sup>1</sup> but today it may more readily be argued that rights such as that to life, to liberty, to security of the person, and to the equal protection of the law, exist independently of the status of the individual. There can be no objective justification for denying their application to the alien *qua* alien.

This view is supported by recent developments. In the Covenant on Civil and Political Rights, 1966, for example, the rights are guaranteed without distinction to all individuals with the territory of a Contracting State and subject to its jurisdiction.<sup>2</sup> Article 4 provides for a right of derogation in time of public emergency which itself would probably justify distinctions between nationals and aliens; it is to be noted that the anti-discrimination provision in the first paragraph is narrower than the general provision in Article 2 (1), and that it does not include 'property, birth or other status' within the prohibited grounds. However, it is expressly stated that there must be no derogation from those rights and freedoms which guarantee life, which prohibit torture and slavery, which secure the recognition of everyone as a person before the law, which forbid retroactive penal legislation, etc.<sup>3</sup> In addition, the exercise of the exceptional right of derogation is subject to the overriding principle which requires that it should not be used to effect discrimination solely on the ground of race, colour, sex, religion, language or social origin.<sup>4</sup>

The principle of non-discrimination imposes distinct limitations upon the liberty of States to deal with aliens. In racial matters, non-discrimination has a normative character and may be adjudged a part of *jus cogens*. In other matters involving distinctions against aliens in regard to property, to access to the courts, to entry, exclusion and expulsion, the question to be asked is whether there is now a sufficient body of rules by which to determine whether the State's exercise of discretion is justifiable, or whether it amounts to unlawful discrimination. Distinctions in these areas purportedly based on alienage, or on the competence to deal with aliens at will, but which are in reality founded on racial grounds, are clearly barred by the general principle set out above. Even in other matters, alienage as the sole basis for distinctions must remain questionable, and it has

*International Law*, vol. 6, p. 322; on submission to the local law, see *British Digest of International Law*, vol. 6, p. 27 et seq. See also O'Connell, *International Law* (2nd ed., 1970), p. 941.

<sup>1</sup> Neufeld, *op. cit.* (above p. 74 n. 5), pp. 100-1; *British Digest of International Law*, vol. 6, pp. 186-7. See also *Johnstone v. Pedlar*, [1921] 2 A.C. 262, *per* Lord Phillimore at p. 296; Draft Principles on Equality in the Administration of Justice, E.C.O.S.O.C. Doc. E/CN.4/1077, 7 October 1971 (Commission on Human Rights—Sub-Commission on Prevention of Discrimination and Protection of Minorities), especially Principles 3, 13 and 14.

<sup>2</sup> Article 2 (1). The exercise of 'political rights' is expressly confined to citizens by Article 25.

<sup>3</sup> Article 4 (2); Oppenheim, *International Law* (8th ed., 1955), vol. 1, p. 688.

<sup>4</sup> Article 4 (1). Compare the similar provision on derogation in Article 15 of the European Convention on Human Rights; see also *Lawless Case*, *Yearbook of the European Convention on Human Rights*, 4 (1961), pp. 470, 472-5.



been the object of both treaties and international practice to prevent injurious discriminations against aliens generally.<sup>1</sup> In a recent United States case, the District Court of Arizona struck down a fifteen year residency requirement for aliens as a condition of eligibility for welfare assistance. Such a condition was held to amount to a denial of equal protection and, in the court's view, alienage was an inherently suspect basis of classification.<sup>2</sup>

Further amelioration of the position of the alien will, most probably, be accomplished through the medium of bi- and multilateral treaties. Over and above the basic human rights, such treaties will seek to assure, for example, national treatment or equality of opportunity or treatment in employment,<sup>3</sup> and equal rights to trade union membership<sup>4</sup> and to the benefits of social security.<sup>5</sup> Article 7 of the European Economic Community Treaty declares that within the scope of application of the Treaty, and without prejudice to special provisions, 'any discrimination on the grounds of nationality shall be prohibited'. Advocate General Lagrange submitted before the European Court of Justice that 'non-discrimination . . . reaches beyond the limits of the establishment of a Common Market',<sup>6</sup> but it will be seen that in practice the E.E.C. national may still be subject to the discriminatory measure of expulsion. But while Member States do retain certain reserve powers, their exercise is subject to the controlling provisions of Community law.<sup>7</sup>

On the general issue of equality, it remains for international law to answer the question whether alienage is, in the circumstances, a 'relevant difference' justifying differential treatment. The principle of non-discrimination expressly rules out certain types of distinction, and raises a very strong presumption of equality. The burden of proof lies on the party seeking to invoke exceptions to show objective justification and proportionality.<sup>8</sup> It is this manner of proceeding

<sup>1</sup> *Hines v. Davidowitz*, 312 U.S. 52 (1941), *per* Black J. at p. 65.

<sup>2</sup> *Richardson v. Graham*, 313 F. Supp. 34 (1970), affirmed 403 U.S. 365 (1971). It may be that this case is limited to aliens admitted for permanent residence, but see *Sailer v. Tonkin*, 356 F. Supp. 72 (1973). See also *Guerra v. Manchester Terminal Corporation*, 350 F. Supp. 529 (1972); *Mohamed v. Parks*, 352 F. Supp. 518 (1973); *Cuk v. Brian*, 355 F. Supp. 133 (1972); *Chapman v. Gerard*, 456 F. 2d 577 (1972); compare *Gonzales v. Shea*, 318 F. Supp. 572 (1970), in which the District Court of Colorado held that United States citizenship as a condition of eligibility under Colorado's 'unique pension program' did not violate the equal protection clause of the Fourteenth Amendment; *Perkins v. Smith*, 370 F. Supp. 134 (1974), in which alienage as a bar to jury service was upheld. In his dissenting opinion in *Espinoza v. Farah Manufacturing Co. Inc.*, 94 S.Ct. 334 (1973), Douglas J. expressed the view that any policy of preferring those born in the United States necessarily involved a discrimination based on birth outside the United States, which was equivalent to discrimination on the (prohibited) basis of national origin (at pp. 340-1).

<sup>3</sup> e.g. I.L.O. Convention on Discrimination (Employment and Occupation) 1958; European Convention on Establishment 1955; European Social Charter 1961; I.L.O. Employment Policy Convention 1964.

<sup>4</sup> e.g. I.L.O. Migration for Employment Convention (Revised) 1949.

<sup>5</sup> e.g. I.L.O. Equality of Treatment (Social Security) Convention 1962.

<sup>6</sup> *Re Electric Refrigerators*, [1963] C.M.L.R. 289, 294; see also *Reyners v. Belgian State*, [1974] 2 C.M.L.R. 305; *Casagrande v. Landeshauptstadt München*, [1974] 2 C.M.L.R. 423; *Alaimo v. Prefect of the Rhône*, [1975] 1 C.M.L.R. 262; *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, [1975] 1 C.M.L.R. 298; *Walrave v. Association Union Cycliste Internationale*, [1975] 1 C.M.L.R. 320, 333, at paras. 28 and 29.

<sup>7</sup> See further below, pp. 149 et seq.

<sup>8</sup> See above, pp. 71-2.

which is prescribed by the general rule of international law, and an indication has been given of the way in which this and more detailed rules control the discretion which States may otherwise enjoy in their treatment of aliens. It is the content of these more detailed rules which is explored below, in relation to the power claimed by States to expel aliens.

#### IV. EXPULSION IN GENERAL INTERNATIONAL LAW

##### 1. THE FUNCTION OF EXPULSION

The essential function of expulsion is the protection of the State and the preservation of that which in continental jurisprudence is described as *ordre public*, public morality and public health. An exercise of the power to expel, therefore, must be related to these purposes and an expulsion which is not executed in good faith may be a breach of the obligations of the acting State.<sup>1</sup> Of course, the principle of good faith in international law is advantageously presumptive, and it will never be very easy to establish *mala fides* on the part of the expelling State. As will be seen, State practice admits of a considerable margin of appreciation in such matters.

##### (a) First examples

It is accepted that expulsion is justified for activities in breach of the local law,<sup>2</sup> and, further, that the content of that local law is a matter for the expelling State alone.<sup>3</sup> Expulsion following judicial sentence and expulsion which is ordered by the executive on general political grounds are readily distinguishable, but here too, with respect to the latter, it is accepted that the 'policy' of each nation must determine whether it will permit the continued residence of the alien.<sup>4</sup> In 1894 it was stated that<sup>5</sup>

in the opinion of Her Majesty's Government if the law . . . permits the expulsion . . . of persons whose presence is dangerous to public order, an expulsion on such ground lawfully carried out according to the municipal law could not be taken exception to, on any ground of international law, by a power whose subjects had been so expelled.

Statements of this nature, which tend only to hint at control, reinforce the

<sup>1</sup> Comparison may be made with the requirement of *bona fides* in municipal law. In *R. v. Governor of Brixton Prison, ex parte Soblen*, [1963] 2 Q.B. 243, the court emphasized that a deportation order made on the ground that the alien's presence was not conducive to the public good would be struck down if it were shown that the Home Secretary did not *honestly* hold such an opinion. Such a ruling shows that the Home Secretary's power is one of controlled discretion, although in practice the evidentiary burden may be very difficult to satisfy. For similar judicial insistence on the relation of statutory discretion to the 'aim and purpose' of the statute in question, see *Padfield v. Minister of Agriculture*, [1968] A.C. 997.

<sup>2</sup> *Dr. Hoby's case* 1843: *British Digest of International Law*, vol. 6, p. 113 (preaching contrary to local laws in favour of the established church).

<sup>3</sup> Cf. the general principles which govern questions of local competence on the one hand, and international opposability on the other hand; see *Anglo-Norwegian Fisheries case*, I.C.J. Reports, 1951, p. 116.

<sup>4</sup> *Miss Dawkin's case* 1870: *British Digest of International Law*, vol. 6, pp. 122-3.

<sup>5</sup> *Haiti case* 1894: *ibid.*, p. 124. See also on expulsions from Zambia, 1966: *Hansard*, H.C. Deb., vol. 725, col. 1880; *British Practice in International Law*, 1966, p. 111.

impression of an uncontrolled and uncontrollable power. On closer examination, however, significant qualifications are apparent, especially in the case of expulsions allegedly based on 'political' reasons. Thus, in 1883, the Law Officers advised that<sup>1</sup>

where . . . the expulsion does not result from a judicial sentence, but from the act of the Executive, Her Majesty's Government is entitled to scrutinize the facts; and if the action of the Executive has been arbitrary and unfriendly, or the mode of its enforcement unnecessarily harsh or oppressive, may properly make the matter the subject of protest or representation.

Judicial inquiry, with its basis in formal investigation and the proof of facts, is a surer guard against abuse than the free exercise by governments of a power of expulsion based on vague and indefinite allegations.<sup>2</sup>

These issues were exemplified by the case of *Mr. Raphael*, who was expelled from Italy in 1907.<sup>3</sup> The Italian Government defended its action on two specific grounds: (1) the provisions of the local law; and (2) the inherent right of every State to expel undesirable aliens. On the second point the Law Officers advised:<sup>4</sup>

This right exists in the abstract . . . but its exercise is subject to at any rate two important qualifications: (1) that it is not restrained by the provisions of municipal law—as it probably is in the present case; and (2) that it is not exercised towards the subject of a friendly power without any apparent justification.

Throughout their advice the Law Officers manifested a desire to keep the Italian Government to their original defence and not to permit recourse to vague and general principles. At the same time they accepted that if the Italian Government did admit that the law had been erroneously applied, they would maintain that the mistake had been made in the bona fide exercise of his discretion by the official at fault, and that therefore no compensation was due as of right. But in the view of the Law Officers, this prospect alone was no reason not to ask both for compensation and for the revocation of the order of expulsion.<sup>5</sup>

### (b) *First propositions*

On the strength of these first few examples, certain preliminary points can be made:

1. States have the 'right', or 'power' or 'competence' to expel aliens.
2. This competence may be exercised in the discretion of the State, and on the grounds which it deems fit.
3. That discretion is confined by reference to its function and purpose.

<sup>1</sup> Cases of *Misses Charlesworth and Booth* 1883: *British Digest of International Law*, vol. 6, pp. 167, 169.

<sup>2</sup> *Expulsion from the Capitulations Countries. Turkey 1860-1893*: *ibid.*, pp. 199, 202-3.

<sup>3</sup> *Ibid.*, p. 151.

<sup>4</sup> *Ibid.*, p. 152. See also the arguments of the Italian Government in favour of an uncontrolled discretion: *ibid.*, p. 153.

<sup>5</sup> Compare *Mr. Luxenburg's* case 1908, in which it was accepted that compensation as of right could not be demanded for a false arrest which was based on a bona fide mistake: *ibid.*, p. 297.



4. Its exercise is subject to the requirement of justification, although a margin of appreciation is left to the expelling State.

The third and fourth points are usually summarized by writers and by governments in a description of the right of expulsion as a right which must not be abused by proceeding in an arbitrary manner.<sup>1</sup> In 1966, Her Majesty's Government set out the principles which govern the decision whether or not to make representations regarding the expulsion of United Kingdom citizens from Commonwealth countries:<sup>2</sup>

We . . . reserve the right to make representations to any Commonwealth Government in any individual case if the manner in which the power . . . is exercised causes hardship, or seems to be arbitrary or unjust . . . This is different from representations, which we cannot make, concerning the operation of the laws of a country perfectly correctly according to their concept of their laws.

### (c) *Expulsion and the Doctrine of Abuse of Rights*

References to function and purpose and to the good faith of the expelling State invite consideration of the doctrine of abuse of rights. This doctrine presents but another aspect of the general issue, whether the right of expulsion is uncontrolled or whether, if the intention behind it is to do harm, it ceases to be an exercise of discretion and becomes unlawful.<sup>3</sup> For example, the 'right' of expulsion may be exercised with the intention of effecting a *de facto* extradition, or in order to expropriate the alien's property, or even for the purposes of genocide, as by mass expulsions over desert frontiers. In such cases the exercise of the power cannot remain untainted by the ulterior and illegal purpose.

It is still a matter of controversy whether a doctrine of abuse of rights even exists in international law.<sup>4</sup> Where States' freedom of action is already limited by customary or conventional law, the doctrine can be of little significance; but, admittedly, customary and conventional rules are often lacking with respect to the entry and removal of aliens. At that point the doctrine may be called in aid. Abuse of rights can then be seen to occur whenever a State avails itself of its rights in such a way as to inflict an injury on another State which cannot be justified by a legitimate consideration of its own advantage; that is to say, when its actions, although strictly speaking 'legal', are coloured by bad faith.<sup>5</sup> While this characterization may be ambiguous, the doctrine can be seen

<sup>1</sup> Oppenheim, *International Law* (8th ed., 1955), vol. 1, p. 691; *Expulsions from Zambia* 1966: *Hansard*, H.C. Deb., vol. 730, col. 1582.

<sup>2</sup> *Hansard*, H.C. Deb., vol. 733, cols. 1223-5, quoted in *British Practice in International Law*, 1967, pp. 112-14.

<sup>3</sup> Consider also the principle established in the law of tort by the decision in *Wilkinson v. Downton*, [1897] 2 Q.B. 57, to the effect that an act done which is calculated or intended to do harm, and which actually results in harm, is actionable, even though it is not strictly a trespass. See also *Hollywood Silver Fox Farm Ltd. v. Emmett*, [1936] 2 K.B. 468, and cf. *Ratray v. Daniels*, (1959) 17 D.L.R. (2d) 134; *Bradford Corporation v. Pickles*, [1895] A.C. 587.

<sup>4</sup> Cf. Schwarzenberger, *International Law and Order* (1971), ch. 6.

<sup>5</sup> See *I.C.J. Pleadings, Nottebohm case*, (Liechtenstein v. Guatemala), vol. 1, pp. 48, 364; Oppenheim, *International Law* (8th ed., 1955), vol. 1, p. 691: 'Although a State may exercise its right of expulsion according to discretion, it must not abuse its right in proceeding in an arbitrary

to involve two elements in particular: the recognition of certain rights in favour of the State, and an exercise of those rights in some way contrary to fundamental rules.<sup>1</sup> After examining a number of expulsion cases, Politis concluded that the requirement of 'abuse' was satisfied where the expulsion was arbitrary, was effected with insufficient motive, was in excess of power or was otherwise affected by some fault on the part of the State authorities.<sup>2</sup> It was his view that the admission and expulsion of aliens generally was an area almost unregulated by international law, and that if the power of expulsion were the logical consequence of the sovereignty of the State, then the doctrine of abuse of rights was necessary in order to relate its exercise more precisely to considerations of humanity.<sup>3</sup>

Further elaboration of the doctrine has been undertaken by Kiss, who concludes that it is a general principle of international law that:<sup>4</sup>

dans les domaines où une autre règle du droit international ne limite pas le pouvoir discrétionnaire des Gouvernements Étatiques, le principe interdisant l'abus de droit est appliqué.

In Kiss's view, decisions and actions on matters affecting expulsion do not sufficiently show repeated conformity to a norm, accompanied by a conviction that the norm is a rule of law, to warrant the finding of any rules. Abuse of rights must therefore be called in aid to regulate those perhaps less significant matters upon which positive international law has nothing particular to say.<sup>5</sup>

(i) *The doctrine before international tribunals.* The doctrine of abuse of rights has received little recognition in international tribunals, and it has not been used explicitly to ground liability.<sup>6</sup> In the case concerning *German Interests in Polish Upper Silesia*, for example, the Permanent Court made only a passing reference to the theory, excluded it in the instant case, and noted that abuse of rights or bad faith could not be presumed.<sup>7</sup> In the *Nottebohm* case Liechtenstein relied to some extent upon the doctrine as indicating the illegality of Nottebohm's expulsion and Guatemala's refusal to readmit him:<sup>8</sup>

manner'; Hyde, *International Law* (1947), vol. 1, p. 230: 'Arbitrary action either in the choice of the individual expelled, or in the method of expulsion, would indicate an abuse of power.'

<sup>1</sup> Kiss, *Abus de droit en droit international* (Thèse, Paris, 1952), p. 11. See also Brownlie, *Principles of Public International Law* (2nd ed., 1973), p. 432: '... what is involved is the determination of the qualities of a particular category of permitted acts: is the power or privilege dependent on the presence of certain objectives?'

<sup>2</sup> Politis, 'La théorie de l'abus des droits', *Recueil des cours*, 6 (1925-I), p. 5 at p. 107. And see, to similar effect, Lauterpacht, *The Function of International Law in the International Community* (1933), p. 289.

<sup>3</sup> Politis, loc. cit. (previous note), pp. 101, 108.

<sup>4</sup> Kiss, op. cit. (above, n. 1), pp. 145, 194-6.

<sup>5</sup> Kiss, op. cit. (above, n. 1), pp. 139-41: 'la distinction entre l'existence du droit et les modalités dont ce droit est exercé — chose "tout à fait indépendante de l'existence de droit" — est caractéristique: elle paraît une affirmation très nette de la conception de l'abus de droit.' These remarks were, however, confined to the legality of conditions, such as a time limit for departure, imposed on the person expelled. Questions involving the treatment of that person were, in Kiss's view, already adequately covered by the rules and standards of international law.

<sup>6</sup> Brownlie, op. cit. (above, n. 1), pp. 430-2, cases cited at p. 431.

<sup>7</sup> P.C.I.J., Series A, No. 7 (1926), pp. 30, 37-8.

<sup>8</sup> I.C.J. Pleadings, *Nottebohm* case, Memorial of the Liechtenstein Government, at pp. 48, 53. See below, pp. 119-20, on the recognition by United States courts of a limited right of re-entry in favour of resident aliens.

While in principle a State is entitled to expel aliens from its territory, this right is subject to the qualifications common to the exercise of any right in international law and especially compelling in this instance, that it may not be exercised unjustifiably, arbitrarily, or in such a way as to constitute an abuse of rights. . . . If an alien acquires by long residence in a State a right to continue to reside there, a right which international law protects by prohibiting his arbitrary expulsion, it follows that that right continues to exist even if the alien temporarily departs . . . In such cases the refusal to re-admit . . . amounts to an abuse of the right to regulate the admission of aliens.

Liechtenstein sought damages for the unlawful arrest, detention and expulsion of Nottebohm, and the refusal to readmit him, together with more general damages for unlawful interference with and deprivation of property. Had the Court been prepared to deal with the merits of the case, it would have had to consider whether Nottebohm's expulsion and the refusal to readmit had been effected in order to expropriate his property. The fact that more than one hundred different proceedings were subsequently initiated in order to deprive Nottebohm of his proprietary interests might then have moved the Court to consider the expelling State's underlying intentions. It would then have had to consider the arguments on behalf of Guatemala, to the effect that the decision on readmission had been taken '*dans l'exercice de sa compétence essentiellement nationale dont il ne doit rendre compte à personne*'. In further support of this point, Guatemala also alleged that,<sup>1</sup>

. . . dans l'état actuel du droit l'admission ou le refus d'admission d'étrangers échappe à toute limitation ou réglementation internationale et par suite à tout contrôle extérieur.

Moreover, the doctrine of abuse of rights could not be applied to security matters in particular, and to the exercise of an assumed absolute, discretionary competence in general.

In his Second Report on State Responsibility, Professor Ago characterizes international responsibility primarily in terms of the breach of an international obligation.<sup>2</sup> On the rôle of 'abuse of rights' he notes:<sup>3</sup>

The question is one of substance involving the existence or non-existence of a 'primary' rule of international law—the rule whose effect is apparently to limit exercise by the State of its rights, or, as others would maintain, its capacities, and to prohibit their abusive exercise . . . If it was recognised that existing international law should accept such a limitation and prohibition, the abusive exercise of a right by a State would inevitably constitute a violation of the obligation not to exceed certain limits in exercising that right, and not to exercise it with the sole intention of harming others . . . If the existence of an internationally wrongful act was recognised in such circumstances, the constituent element would still be represented by the violation of an obligation and not by the exercise of a right.

<sup>1</sup> *I.C.J. Pleadings, Nottebohm case*, Duplique of the Guatemalan Government, p. 505 at p. 542. It was also suggested that the conferment of nationality on Nottebohm by Liechtenstein itself constituted an abuse of rights *vis-à-vis* Guatemala.

<sup>2</sup> U.N. Doc. A/CN.4/233: *Yearbook of the I.L.C.* (1970-II), p. 177 at p. 191.

<sup>3</sup> *Ibid.*, p. 193. See also *Yearbook of the I.L.C.* (1973-I), p. 19, para. 12.



This approach is preferable by far to that of Politis, for example, who takes the sovereign power of the State as his first premiss and then seeks to confine it by imposing upon it the doctrine of abuse of rights. If the power of expulsion is seen in its proper context, that is, as but one right in the complex legal relationship between receiving State and protecting State, then the limitations which international law demands in its exercise become apparent. Although it cannot be affirmed that the doctrine exists as a general principle of positive law, nevertheless the concept of abuse of rights is still helpful in focusing attention on the intentions which motivate expulsion and on the manner of its execution.<sup>1</sup>

(ii) *The Uganda expulsions 1972*. Awareness of the general notion also invites an appreciation of the fact that, in certain circumstances, expulsion may well be but one aspect of something else, such as expropriation. In August 1972, President Amin of Uganda announced that he was asking Britain to take responsibility for all United Kingdom citizens of Asian origin resident in Uganda, 'because they are sabotaging the economy'.<sup>2</sup> A time limit of three months was set for their departure and stringent controls were introduced to restrict the transfer of funds abroad. The expulsion order was implemented by two presidential decrees. These in effect made continued residence illegal, and actual departure was encouraged by the threat that Asians who remained behind would be herded into concentration camps. The Immigration (Cancellation of Entry Permits and Certificates of Residence) Decree 1972, made on 9 August 1972,<sup>3</sup> cancelled the specified documents which had previously been issued to any person of Asian origin, extraction or descent who was a citizen of the United Kingdom, India, Pakistan or Bangladesh. An absolute discretion was retained to reinstate any such permit holder. The Declaration of Assets (Non-Citizen Asians) Decree 1972, signed on 4 October but made retroactive to 9 August,<sup>4</sup> provided that no person leaving Uganda by reason of the earlier decree was to transfer 'any immovable property, bus company, farm, including livestock, or business to any other person'.<sup>5</sup> Further provisions were made for every 'departing Asian' to declare his assets and to effect transfer of his property or business to an agent.<sup>6</sup> In return, every such Asian was to be given a receipt and

<sup>1</sup> Note the related concept of 'incomplete privilege', Brownlie, *op. cit.* (above, p. 80 n. 1), pp. 452-3, 506.

<sup>2</sup> *The Times* and the *Guardian*, 5 August 1972. See also the *Guardian*, 6 July 1972, for deportation measures against other foreigners, particularly Senegalese, for alleged criminality.

<sup>3</sup> Printed in *International Legal Materials*, 11 (1972), pp. 1388-9. See also Uganda Immigration Act 1969 (No. 19), section 9 (1); Plender, 'The Exodus of Asians from East and Central Africa: Some Comparative and International Law Aspects', *American Journal of Comparative Law*, 19 (1971), p. 287; Sharma and Wooldridge, 'The Expulsion of the Uganda Asians', *International and Comparative Law Quarterly*, 23 (1974), p. 397; *Proceedings of the American Society of International Law*, 67 (1973), pp. 122-40.

<sup>4</sup> *International Legal Materials*, 11 (1972), pp. 1389-91.

<sup>5</sup> Section 1 (a), (2). Subsections (b) and (c) prohibited mortgages of such properties and, in the case of companies, the issue of new shares, any change in the salaries of staff, or the appointment of new directors or any variation in their terms of service or remuneration.

<sup>6</sup> Section 2 (1), (2). Such agent was responsible for looking after the property until transferred by sale to a Uganda citizen: section 2 (3). Section 6 anticipated the possibility of an agent leaving Uganda for good or otherwise becoming incapable of acting, in which case the Minister was to appoint a trustee.

the Minister was directed to keep a register of properties so declared.<sup>1</sup> A penalty of fifty thousand shillings or two years imprisonment or both was imposed for non-compliance.<sup>2</sup>

Originally the expulsion order was destined to affect Asian citizens of Uganda as well, but after pressure from other African governments and the description of this facet of his policy as racist,<sup>3</sup> President Amin changed his mind.<sup>4</sup> In fact large numbers of Ugandan citizens were deprived of their status by reason of 'defects' said to have been found in their original registration. Many of those affected became stateless and they were issued with emergency travel documents under the auspices of the United Nations High Commissioner for Refugees.<sup>5</sup> In the General Assembly the United Kingdom at first pressed for a debate on the expulsions as an important and urgent matter. While affirming the United Kingdom's duty to admit its nationals, the Foreign Secretary stressed the humanitarian aspects. The Uganda authorities argued that the matter was entirely within the reserved domain of domestic jurisdiction. They denied that there was any danger to the lives of United Kingdom citizens, or that assets were being confiscated. The British representative replied that the issues transcended domestic jurisdiction and that the hardships caused by the collective expulsions of members of an ethnic group raised humanitarian issues germane to the wide purposes of the Charter of the United Nations. Eventually, the United Kingdom agreed not to press for a debate in the General Assembly after an indication that Uganda was willing to discuss an extension of the deadline and an offer of mediation from President Mobutu of Zaire.<sup>6</sup> At the same time, attempts to secure positive action from the United Nations Commission on Human Rights were also defeated.<sup>7</sup> In a strictly bilateral sense it may be doubted to what extent any duty was owed to Uganda. However, for the most part, the British Government accepted the responsibility which it had for its citizens, and which it owed also to other States faced with an influx of refugees.

<sup>1</sup> Sections 2 (5); 3.

<sup>2</sup> Section 5. Section 4 made provision for the sale of the properties declared, but none in respect of the purchase money.

<sup>3</sup> The *Guardian*, 22 August 1972 (President Nyerere).

<sup>4</sup> The *Guardian*, 23 August 1972.

<sup>5</sup> The *Guardian*, 23 October 1972. Co-operation was also arranged with the Intergovernmental Committee for European Migration and the Red Cross. Clearly, no State was absolutely bound to receive the stateless Asians, and India and African countries bordering on Uganda declared that they would not admit them. However, the Uganda authorities were able to rely on both the good offices of the United Nations High Commissioner and the adherence of most European States to international conventions on refugees and stateless persons. Cf. Schwarzenberger, *International Law*, vol. 1, p. 377.

<sup>6</sup> The *Times* and the *Guardian*, 30 September 1972. In fact no extension was granted, although the Ugandan authorities gave certain assurances to the Secretary-General of the United Nations that there would be no maltreatment or oppression, that no property was being confiscated, and that departing Asians were being allowed to take with them their personal effects and up to £50 in cash: the *Guardian*, 5 October 1972. President Mobutu, on the other hand, informed the Secretary-General that Amin had agreed to a further three months: the *Guardian*, 6 October 1972.

<sup>7</sup> See debate in the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities: E/CN. 4/Sub.2/SR. 636-50, 651, 656-63 (August 1972). On the general issue and on the rights of immigrants as minorities, see E/CN. 4/Sub.2/SR. 673-6, 686 (September 1973).



There was some controversy over stateless Asians separated from their families who still retained United Kingdom citizenship, but this was eventually resolved in favour of the refugees.

There can be little doubt that the Uganda expulsions contravened the rules and principles of international law. The expulsions were unprovoked and allegations of 'sabotaging the economy' and transferring funds abroad were never substantiated.<sup>1</sup> If such charges had been proved, then they might have warranted repressive measures against the responsible individuals, but not against the whole of one racially distinct minority. Expulsion purportedly based on nationality, but in fact selective by reference to racial or ethnic criteria clearly offends against the principle of non-discrimination. In addition, there was considerable evidence of harassment and a general failure on the part of the Uganda authorities, particularly the army, to respect the life and dignity of those affected.<sup>2</sup> Although a period of three months might be considered reasonable, it was a period of widespread confiscation of personal and other property, and little or no indication has been given of any intention or willingness to pay compensation. This fact itself suggests that the expulsions were effected, in part at least, for the purposes of an unlawful expropriation. The value of the property left behind has been variously estimated at between £100m. and £500m., and the United Kingdom Government informed Uganda that it reserved all rights in respect of these matters.<sup>3</sup>

(iii) '*Confiscatory expulsion*'. The United Kingdom adopted a similar stand in regard to the property of its citizens following the expulsions from Egypt in 1956<sup>4</sup> and, in retaliation, the Government imposed exchange control restrictions on Egyptian banks in London. The issues between the parties were finally settled by agreement and, in return for the lifting of exchange control, the United Arab Republic agreed (1) to lift sequestration measures; (2) to return British property, with certain exceptions; and (3) to pay £27,500,000 in full and final settlement for the property retained and for injury or damage to property incurred prior to 1959.<sup>5</sup> It is clear that the intention to expropriate without

<sup>1</sup> The suggestion that the Asians of Uganda brought upon themselves their own expulsion by not marrying with or otherwise integrating into the African population (Ghai, *Problems of a displaced minority: the new position of East Africa's Asians*, Minority Rights Group, Report No. 16) amounts to nothing less than the condemnation of a minority for being a minority.

<sup>2</sup> See, for example, reports in the *Guardian*, 22 December 1972; *The Times*, 26 September 1972.

<sup>3</sup> The Foreign and Commonwealth Office set up the Uganda Property Records Section to compile data about the assets left behind by United Kingdom citizens: the *Guardian*, 21 December 1972; *Hansard*, H.C. Deb., vol. 848, Written Answers, col. 385; H.C. Deb., vol. 867, Written Answers, col. 290. For the United Kingdom view on compensation, see H.C. Deb., vol. 868, Written Answers, col. 2751; H.C. Deb., vol. 878, cols. 439-50; and for subsequent progress, see H.C. Deb., vol. 883, cols. 1557-8.

<sup>4</sup> *Hansard*, H.L. Deb., vol. 200, col. 633. In a letter to the Secretary-General of the United Nations the Foreign Secretary condemned the expulsions for their 'brutal haste' and 'indiscriminate nature': H.C. Deb., vol. 561, col. 589.

<sup>5</sup> United Kingdom-United Arab Republic Agreement concerning Financial and Commercial Relations and British Property in Egypt 1959 (Cmd. 639): *International and Comparative Law Quarterly*, 9 (1960), pp. 288 et seq. For later developments see *British Practice in International Law*, 1964-I, pp. 65-6, 206; Exchange of Notes regarding the Use of British non-resident blocked Bank Accounts in Egypt, March 1973, *United Kingdom Treaty Series*, No. 49 (1973) (Cmd. 5290).



compensation, because it denies the essential function of expulsion, may also deny to that act the character of a bona fide exercise of discretion.<sup>1</sup>

A useful analogy is to be found in the principles applicable to confiscatory taxation.<sup>2</sup> The limitations on the 'sovereign power' of taxation have been succinctly stated by Albrecht and they may be extended, *mutatis mutandis*, to the case of 'confiscatory expulsion':<sup>3</sup>

According to the doctrine of the sovereign right of taxation, and in the absence of special treaty provisions, there would seem to be no basis in international law for objections to the exercise by a State of its right to tax where there is no discrimination against aliens . . . Nevertheless, an exception must be made in the case of confiscatory taxation, for it is a rule of international law that confiscation, or expropriation without compensation, is illegal. There is little difference in the practical effects of confiscation and confiscatory taxation. Surely, then, confiscation in the guise of taxation cannot be permitted when confiscation itself is prohibited. A State may tax aliens without unfair discrimination under international law only so long as the taxation is not confiscatory. When taxation becomes confiscatory, it becomes illegal.

In like manner, it is reasonable to conclude that where expulsion becomes confiscatory, it also becomes illegal.

(iv) *Expulsion for other ulterior motives.* The power of expulsion may be similarly employed as an instrument of genocide or mass murder, and in such cases it is then but one aspect of the greater wrong. Two recent incidents contained elements which suggested that the action taken was intended or calculated to do harm. In retaliation for Iran's policy over navigation on the Shatt-al-Arab river, Iraq expelled large numbers of Iranians from that country in April and May 1969. The expulsions were carried out at a moment's notice and in circumstances of great brutality, with bus-loads of refugees being deposited in the border towns. The Iranian Government complained to the Security Council on 12 May, protesting against the 'arrests, expulsions and tortures' inflicted by the Iraqi authorities on the deported Iranians.<sup>4</sup> Later the same year, the Ghanaian Government tightened controls over the resident alien population both for economic reasons and because, it was said, some 90 per cent. of those known to have criminal records or be in prison were aliens. The result of the Government's directive was that a mass exodus took place in conditions of great panic and by the end of January 1970 it was estimated that some 200,000 African aliens had quit the country. The Government of Togo closed its border after receiving 40,000 refugees, and some 100,000 Nigerian nationals were

<sup>1</sup> Note the analogous approach adopted by municipal courts in relation to the exercise of statutory powers. In *Brownssea Haven Properties Ltd. v. Poole Corporation*, [1957] 3 W.L.R. 669, [1958] 2 W.L.R. 137 (C.A.), the Court condemned the corporation's introduction of a one-way street system through the use of a general police power to control traffic temporarily in times of processions and the like. The corporation had earlier failed in its application for such a system under the proper legislation. Cf. *Backhouse v. Lambeth L.B.C.*, *The Times*, 14 October 1972.

<sup>2</sup> *British Practice in International Law*, 1964-II, pp. 202-6; 1965-I, pp. 45-6.

<sup>3</sup> Albrecht, 'Taxation of Aliens in International Law', this *Year Book*, 29 (1952), p. 145 at p. 172; cited in *British Practice in International Law*, 1964-II, pp. 202-3; on respect for acquired rights, see below, pp. 116 et seq.

<sup>4</sup> Keesing's *Contemporary Archives*, 1969-70, 23544a.

accommodated in camps in their own country. Following representations from neighbouring States, Ghana took steps to allay the panic and set up its own camps in an effort to deal with all those who wished to regularize their status. The Government denied that it was at any time contemplating a mass expulsion of aliens, but by then the frantic flight along the roads leading to the frontiers had already begun.<sup>1</sup> In practice, there may be little difference between forcible expulsion in brutal circumstances, and 'voluntary removal' promoted by laws which declare continued residence illegal and encouraged by threats as to the consequences of continued residence.<sup>2</sup> The introduction of a new regime of permits can quite effectively secure the *de facto* expulsion of aliens. In order to establish or negative good faith, consideration must therefore be given to all the circumstances, including the reasons underlying the measures taken and their actual consequences.

(d) *Expulsion to a particular State as the breach of an international obligation*

The question remains, whether expulsion to a particular State can ever amount to a breach of an international obligation. In one field, the States Parties to the 1951 Convention relating to the Status of Refugees have indeed undertaken obligations limiting their competence in the matter.<sup>3</sup> As amended by the 1967 Protocol, this Convention defines as a refugee a person who,<sup>4</sup>

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former residence is unable or, owing to such fear, is unwilling to return to it.

Although the Convention does not guarantee a right of entry in so many words, it does oblige States Parties not to impose penalties for illegal entry on refugees, provided that they report to the authorities without delay and show good cause for their actions.<sup>5</sup> Article 32 in turn declares that a refugee lawfully within a State shall be expelled only on grounds of national security or public order, and that he shall be permitted a hearing and appeal against such order of expulsion,

<sup>1</sup> Keesing's *Contemporary Archives*, 1969-70, 23824; the *Guardian*, 11, 12 December 1969; 22 January 1970. For similar actions by the Zanzibari regime, see the *Guardian*, 14 October 1971; the *Observer*, 17 October 1971; for reciprocal action between Kenya and Tanzania, see the *Guardian*, 20 December 1974; and for the expulsion of Kurds from Iraq to Turkey and Iran, see *The Times*, 18 January 1974. Note Brownlie's suggestion that expulsion which causes specific loss to the national State receiving groups without adequate notice would ground a claim for indemnity as for incomplete privilege: *op. cit.* (above, p. 80 n. 1), p. 506.

<sup>2</sup> On General Amin's threat to set up 'concentration camps' for those who remained in Uganda after the deadline, see *The Times*, 14, 15 September 1972; the *Guardian*, 14 September 1972.

<sup>3</sup> *United Nations Treaty Series*, vol. 189, p. 150.  
<sup>4</sup> Article IA (2), as amended by Article I (2) of the 1967 Protocol: *United Nations Treaty Series*, vol. 606, p. 267. See also United States, *Policy Guidelines on Asylum Requests* 1972: *International Legal Materials*, 11 (1972), p. 228; United Kingdom, *Statement of Immigration Rules for Control on Entry* (Commonwealth Citizens), 1973 H.C. No. 79, para. 54; (E.E.C. and other Non-Commonwealth Citizens), 1973 H.C. No. 81, para. 51.

<sup>5</sup> Article 31 (1).



'except where compelling reasons of national security otherwise require'.<sup>1</sup> Article 33 repeats the rule prohibiting the expulsion or return of a refugee to the frontiers of a territory where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Derogation is permitted only for overriding reasons of national security.<sup>2</sup> In the *Refugee (Germany)* case, the court held that a refugee who had obtained an extension to his residence permit on the basis of untruthful statements was not 'lawfully' within the Federal Republic. The restriction on permissible grounds of expulsion did not, therefore, apply to him in the manner foreseen by Article 32. However, the court also held that the right inherent in Article 33 was not similarly tied to lawful presence, and it must be interpreted to mean that no refugee, whether lawfully or unlawfully within the territory, may be expelled to a place of persecution.<sup>3</sup> An almost identical conclusion was reached in the recent United States case, *Chim Ming v. Marks*.<sup>4</sup>

The definition of 'refugee' provided by the 1951 Convention, as amended, has been adopted in Article I of the Organization of African Unity Convention on Refugee Problems in Africa.<sup>5</sup> Article II affirms that the grant of asylum is a peaceful and humanitarian act and restates the prohibition on measures which would compel a refugee to return to or remain in a territory where he faces persecution.<sup>6</sup> No express concession is made to overriding considerations of national security, although if a Member State finds difficulty 'in continuing to grant asylum to refugees', then recourse is to be had to other Member States and through the O.A.U.<sup>7</sup>

<sup>1</sup> The Contracting States also agree to allow such refugee a reasonable period in which to seek legal admission to another State: Article 32 (3); *Expulsion of an Alien (Austria)* case, I.L.R., vol. 28, p. 310. During that period the Contracting States have the right to apply such internal measures of control as they deem appropriate; see, for example, article 28, ordonnance du 25 novembre 1945; Kiss, *Répertoire de la pratique française en matière de droit international public*, vol. 4, p. 462.

<sup>2</sup> Article 33 (2). Stateless persons are to enjoy similar rights, although there is no corresponding or explicit reference to the likelihood of persecution; see Article 31, Convention Relating to the Status of Stateless Persons 1954: *United Nations Treaty Series*, vol. 360, p. 117.

<sup>3</sup> I.L.R., vol. 28, p. 297. In the *Yugoslav Refugee (Germany)* case, I.L.R., vol. 26, p. 496, the court held that lawful residence in the State could be established even if preceded by an illegal entry. See also *Homeless Alien (Germany)* case, *ibid.*, p. 503.

<sup>4</sup> 505 F. 2d 1170 (1974).  
<sup>5</sup> *International Legal Materials*, 8 (1969), p. 1288. The 1951 definition originally qualified refugee status by reference to flight 'as a result of events occurring before 1st January 1951'. In interpreting this provision in *Molefi v. Principal Legal Adviser*, [1971] A.C. 182, the Judicial Committee of the Privy Council, on appeal from Lesotho, considered that the events contemplated were happenings of major importance involving territorial or profound political changes. In this case the appellant claimed the benefit of the Convention and the right not to be expelled to South Africa. It was conceded that he was outside his country and that he had a well-founded fear of persecution (at p. 195), but the Privy Council agreed with the Lesotho Court of Appeal that the 1948 elections which brought the Nationalists to power in South Africa, and the pre-1951 legislation and repressive government policy, were merely the background to later events (at p. 197). Because the appellant had remained in South Africa up until 1961, it was the view of the court that it could not be said that he was outside his country 'as a result of events occurring before 1951'. The 1967 Protocol will avoid strictly legal interpretations of this nature, and the O.A.U. Convention goes further, to provide that the benefits of refugee status shall also apply to those forced to leave on account of external aggression, occupation, foreign domination or events seriously disturbing public order: Article I (2).

<sup>6</sup> Article II (2), (3).

<sup>7</sup> Article II (4), (5). In such cases provision is to be made for temporary residence.



Regional conventions of this nature,<sup>1</sup> together with developments in municipal law, provide further evidence of the position in general international law. It may be affirmed that the prohibition on the return of refugees to countries of persecution has established itself as a general principle of international law, binding on States automatically and independently of any specific assent. Earlier State practice provides ample support for the view that, for example, Articles 32 and 33 of the 1951 Convention reflected or crystallized a rule of customary international law at the time of their formulation, and practice since that date reaffirms this conclusion. The high standard of proof which is required on the issue of *opinio juris* can in this case be satisfied.<sup>2</sup> The relevant provisions are of a 'fundamentally norm-creating character',<sup>3</sup> and the fact that expulsion may be permitted in exceptional cases operates not to deny this premiss, but simply to indicate the boundaries of the discretionary power remaining. Furthermore, the relevant conventions have enjoyed widespread and representative participation,<sup>4</sup> and the time factor also operates in favour of the rule against return as a rule of customary international law, binding on States which have not ratified or acceded to the treaties. Depending on the particular circumstances, breach of the rule will therefore involve international responsibility towards other contracting parties, towards the international community as a whole, or towards a regional institution.<sup>5</sup>

International obligations established on a regional basis continue to be of importance in the protection of individual rights, particularly while States remain reluctant to embody the subjective right of asylum in a multilateral treaty.<sup>6</sup> The bilateral recognition of the principle of non-extradition of political offenders, although important as one aspect of asylum, tends to understate the broader, humanitarian issues. Nevertheless, the exception amounts to a reciprocal agreement between States which recognizes the right to grant asylum in certain defined circumstances. As Lauterpacht noted in 1944:<sup>7</sup>

We are confronted with the impressive fact that in the legislation of modern States there are few principles so universally adopted as that of the non-extradition of political offenders.

Attempts to establish this principle on a regional basis were made during the

<sup>1</sup> See also Article 22 (7), (8) of the American Convention on Human Rights 1969, which approximates the political offender to the persecuted and emphasizes the status of individual rights. Text: *American Journal of International Law*, 65 (1971), p. 679; *International Legal Materials*, 9 (1970), p. 101; Brownlie, *Basic Documents on Human Rights* (1971), p. 399. Cf. Declaration on Territorial Asylum 1967, adopted by the General Assembly in Resolution 2312 (XXII), 14 December 1967, *General Assembly Official Records*, 22nd Session, Suppl. 16.

<sup>2</sup> See Brownlie, *Principles of Public International Law* (2nd ed., 1973), pp. 8-9.

<sup>3</sup> *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, p. 3 at p. 42.

<sup>4</sup> As of August 1976 there were sixty-six States parties to the 1951 Convention and sixty States parties to the 1967 Protocol.

<sup>5</sup> See Roberto Ago (Special Rapporteur), *Second Report on State Responsibility*, U.N. Doc. A/CN.4/233: *Yearbook of I.L.C.* (1970-II), p. 177.

<sup>6</sup> See the views of the Sixth Committee, U.N. Doc. A/6912, paras. 64, 65; cf. I.L.C. Survey of International Law, U.N. Doc. A/CN.4/245, p. 191 et seq.; General Assembly Resolution 2780 (XXVI), 3 December 1971.

<sup>7</sup> 'The Law of Nations and the Punishment of War Crimes', this *Year Book*, 21 (1944), p. 58.

negotiations leading to the European Convention on Extradition 1957, but these were largely frustrated by certain fundamental differences of opinion. Two attitudes were never finally reconciled: the first reflected the view that extradition should be generally facilitated, with the chief aim being the suppression of crime; and the second, the 'restrictive' view, which demanded the introduction of humanitarian considerations.<sup>1</sup>

The differences are readily apparent in those provisions which deal with the political offence exception. Article 3 (1) of the Convention forbids the extradition of those accused of political offences, or of offences connected with political offences, and provides that the requested party shall determine the character of the particular offence. The form adopted did not receive unanimous agreement among the Committee of Experts, especially by reason of its mandatory character. The Committee therefore decided that reservations should be permitted under Article 26.

Subsection (2) attempts to take account of the humanitarian aspect and provides that extradition shall not be granted<sup>2</sup>

if the requested Party has substantial grounds for believing that a request for extradition has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that the person's position may be prejudiced for any of these reasons.

The practice common in European bilateral treaties of excluding the assassination of a Head of State from the class of political offences is recognized by subsection (3).<sup>3</sup> Once again this was not accepted by all the delegations and it was anticipated that there would be further reservations on this point. This express acceptance by the framers of the Convention that States Parties should be able to make reservations to various provisions is one element which will affect the weight to be accorded to those provisions as evidence even of a regional custom.<sup>4</sup> Certain general conclusions, however, are possible:

1. There is no general or customary rule of international law which forbids the extradition of political offenders. This view is supported both by the variety of State practice and by the fact that decision on the character of a given offence is left, inevitably, to the authorities of the requested party;<sup>5</sup> it is a unilateral action only occasionally limited by express treaty obligations.<sup>6</sup>

<sup>1</sup> See generally, *Explanatory Report on the European Convention on Extradition*, Council of Europe, 1969.

<sup>2</sup> Cf. United Kingdom Fugitive Offenders Act 1967, section 4.

<sup>3</sup> Such a provision is commonly called an 'attentat' clause, and seems to have originated in the Belgian law of 1856: *British Digest of International Law*, vol. 6, pp. 668-9. Although it will depend on the precise role of the Head of State within a given system, in many cases assassination will be the most political of all political crimes. See also section 4 (5), Fugitive Offenders Act 1967; article 3, 1922 United States-Venezuela Extradition Treaty: *League of Nations Treaty Series*, vol. 49, p. 43.

<sup>4</sup> *North Sea Continental Shelf cases*, *I.C.J. Reports*, 1969, p. 3 at pp. 38-9; *Asylum case*, *I.C.J. Reports*, 1950, p. 266 at pp. 276-7; but cf. Baxter, *Recueil des cours*, 129 (1970-I), pp. 48-51.

<sup>5</sup> Note the reservation made to Article 3 (3) by Denmark, Norway, Sweden, Switzerland and Finland.

<sup>6</sup> For example, those assumed under the Genocide Convention.

2. The general principle must now be interpreted in the light of the rule which requires the refusal of surrender on humanitarian grounds, that is, where the individual is likely to be prejudiced by reason of irrelevant distinctions or where there is a possibility of the violation of fundamental human rights.<sup>1</sup>
3. There is no general or customary rule of international law which excludes assassination of a Head of State or member of government from the category of political offence.<sup>2</sup>

Although proposed with specific reference to a European context, these conclusions are capable of wider application. Refugees and political offenders are particularly susceptible of violation of basic human rights, and it is these considerations which dominate questions concerning their entry, expulsion or extradition. The political nature of an offence is only one aspect of asylum, but it is evidently the one aspect in which political considerations will vie with humanitarian considerations. A treaty regime such as that established by the 1951 Refugees Convention, with its emphasis on human rights, raises the possibility of exceptions to the general rule that a State is not free to take up the claims of those who are not its nationals.<sup>3</sup> Once such exceptions are recognized, then a third State or other subject of international law would acquire the standing necessary to take up the case of an alien likely to be expelled to any State in which he may face persecution or punishment, whether that State be his own or not.<sup>4</sup> For certain obligations are owed by States *erga omnes*, some deriving from customary international law, others from particular treaties. The present state of international law favours the latter and, especially, the circumstance of membership in some regional organization endowed with competence to take action. The concept of generalized obligations owed to the international community as such may not, for the moment, offer a very profitable line of inquiry.

(i) *Locus standi under the European Convention on Human Rights.* The involvement of third parties, whether they be States or organizations, in the protection of the individual against arbitrary expulsion can be seen under the European Convention on Human Rights. The European Commission has recognized that, in certain circumstances, expulsion may amount to inhuman

<sup>1</sup> Note Article 3, European Convention on Human Rights. See Application 480/58: *Yearbook of the European Convention on Human Rights*, 2 (1959), p. 354; Application 984/61; Application 1802/63: *ibid.*, 6 (1963), p. 480.

<sup>2</sup> Cf. Articles 7, 8, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons 1973.

<sup>3</sup> Further exceptions were expressly mentioned by the International Court of Justice in the *Reparation for Injuries* case, *I.C.J. Reports*, 1949, p. 174 at p. 181.

<sup>4</sup> There is no doubt that a State may protest where its own national is expelled to a third State in which he is then prosecuted. See the case of *Greville Wynne*, a British subject deported from Hungary to the U.S.S.R. to face prosecution for political offences, specifically espionage. The extradition procedure was not used and the United Kingdom protested about the circumstances in which his removal had taken place: *The Contemporary Practice of the United Kingdom in the Field of International Law*, 1962-II, pp. 210-14; 1963-I, p. 27. Cf. the *Soblen* case, below, pp. 94-5.



or degrading treatment within Article 3 of the Convention.<sup>1</sup> A State Party to the Convention must be understood<sup>2</sup>

. . . as agreeing to restrict the free exercise of . . . rights under general international law, including its right to control the entry and exit of foreigners to the extent and within the limits of the obligations . . . accepted under the Convention.

Article 24 provides that any Party may refer alleged breaches of the Convention by another Party to the Commission. It does not have to show the breach of any obligation owed to itself. The State which brings a complaint under Article 24<sup>3</sup>

is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe.

Thus, every State Party to the Convention has an independent and sufficient interest in the fulfilment of its obligations. It is therefore open to any such State to allege that the expulsion of an individual, whatever his nationality and wherever he might be sent, constitutes a violation of the European Convention. An expulsion which violated the rights and freedoms guaranteed would incur the international responsibility of the State, in so far as its action amounted to the breach of an international obligation owed to the regional community. In practice, such violation might be based either on a failure by the State to permit to the individual the usual guarantees of extradition procedure,<sup>4</sup> or upon the nature of the regime to which it was proposed to remove him.<sup>5</sup> It thus becomes possible to challenge the arbitrary and undesirable consequences which may follow from a 'straightforward application of the immigration laws'.<sup>6</sup>

(ii) *The practice of 'disguised extradition'*. In the practice known as 'disguised extradition', the usual procedure is for the individual to be refused admission

<sup>1</sup> Application 984/61. And note Application 1802/63: *Yearbook of the European Convention on Human Rights*, 6 (1963), p. 480.

<sup>2</sup> Application 434/58: *ibid.*, 2 (1959), pp. 354, 373.

<sup>3</sup> Application 788/60 (the *Pfunders* case): *ibid.*, 4 (1961), pp. 139, 142. See also Resolution of the Standing Committee of the Consultative Assembly, June 1967 (Doc. B (67) 37), especially paragraph 10; Fawcett, *The Application of the European Convention on Human Rights* (1969), pp. 272-7.

<sup>4</sup> For example, the rule against the surrender of political offenders, the rule of speciality and the general requirement that the requesting State make out a *prima facie* case. Cf. Article 6, European Convention on Human Rights.

<sup>5</sup> For example, by reference to Article 3, the prohibition on torture, inhuman or degrading treatment or punishment.

<sup>6</sup> In 1972, two Moroccan Air Force officers who had been involved in the attempted assassination of the King of Morocco were summarily returned to that country from Gibraltar under the provisions of the local immigration laws. They were subsequently executed: the *Guardian*, 18, 19 August 1972; *The Times*, 19, 22 August 1972; the *Observer*, 20 August 1972, 14 January 1973. In December 1973, the European Commission on Human Rights declared as admissible the petition of the widow of one of the officers, alleging that the detention and return to Morocco of her husband after he had sought asylum in Gibraltar were contrary to Arts. 3, 5 (4) and 8 of the European Convention: Council of Europe communiqué C (73) 28. In August 1974 a friendly settlement was announced, under which the British Government made a payment of £37,500 *ex gratia*, and the application was withdrawn: *The Times*, 14 August 1974 (*Amekrane v. United Kingdom*).

at the request of a foreign State, and for him to be deported to that or any other State which wishes to prosecute or punish him. The effect is to override those usual provisions of municipal law which commonly permit the legality of extradition proceedings to be contested and allow for the submission of evidence that the individual is being pursued for political reasons.

While the legality of the resort to immigration laws for such purposes has long been controversial,<sup>1</sup> it may also be argued that the immigration laws have a supporting role to play in the international control of criminals, and that therefore *de facto* extraditions made under those laws are justified.<sup>2</sup> It may indeed be a little spurious to demand the use of extradition proceedings in a State which has already decided, as a matter of immigration policy, that the alien will not be allowed to remain. Be that as it may, the established and primary purpose of deportation is to rid the State of an undesirable alien, and that purpose is achieved with the alien's departure. His destination, in theory, should be of little concern to the expelling State, although in difficult cases it may put in issue the duty of another State to receive its national who has nowhere else to go. Unlike extradition, which is based on treaty, expulsion gives no rights to any other State and, again in theory, such State can have no control over the alien's destination. In exclusion proceedings, States generally assume a greater latitude in regard to the destination to which the individual is to be removed, and it is not uncommon to secure his removal to the port of embarkation.<sup>3</sup> The wide choice available to State authorities and accepted in practice must be reviewed against the fact that the excluded alien will only rarely be entitled to appeal against the proposed destination or to arrange for his own departure.<sup>4</sup> Once he has passed the frontier, however, State practice frequently allows him to benefit from certain procedural guarantees. Thus, he may be able to appeal, not only against the expulsion itself, but also against the proposed destination, and he may be given the opportunity of securing entry to another country of his choice.<sup>5</sup> Of course, in the final analysis, if no other State is willing to receive him, then the only State to which the alien can lawfully be removed is his State of nationality or citizenship. If he is unable to secure admission elsewhere, his appeal against removal will generally fail.<sup>6</sup>

<sup>1</sup> See the Circular Letter of 19 March 1907 to Officers and Employees of the Immigration Service, in which the United States Government condemned the practice: Hackworth, *Digest*, vol. 3, pp. 717 et seq.; see also *ibid.*, vol. 4, p. 30. In *Strongford's* case in 1906, the Home Office showed its awareness that an alien's own State might have cause for complaint if he were to be deported to some other State which wanted to put him on trial: *British Digest of International Law*, vol. 6, p. 238. See also *Glen's* case 1910: *ibid.*, pp. 239-40; *Christmann's* case 1912: *ibid.*, p. 241.

<sup>2</sup> Shearer, *Extradition in International Law* (1971), ch. 3, pp. 68, 78 et seq.

<sup>3</sup> e.g. Immigration Act 1971, Sch. 2, para. 8 (1) (c); compare Sch. 3, para. 1 (1). For examples of exclusions on request, see Evans, 'Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice', this *Year Book*, 40 (1964), p. 77, at pp. 83-4 and *passim*.

<sup>4</sup> *Ma v. Barber*, 357 U.S. 185 (1958); cf. Immigration Act 1971, section 17 (1), (5).

<sup>5</sup> e.g. 66 Stat. 212 (1952), 8 U.S.C. s. 1253 (a). Cf. Immigration Act 1971, sections 15, 17, 5 (6); Sch. 3, para. 4; *R. v. Governor of Brixton Prison, ex parte Sliwa*, [1952] 1 All E.R. 187.

<sup>6</sup> *Secretary of State v. Croning*, [1972] Imm. A.R. 51; *Secretary of State v. Fardy*, [1972] Imm. A.R. 192; *Ali v. Secretary of State*, [1973] Imm. A.R. 19, 33 (C.A.). See also Article 25, Aliens Law of Venezuela 1925, cited by de Boeck, *Recueil des cours*, 18 (1927-III), p. 447 at

(iii) *Municipal law controls*. The case for simplified extradition procedures will continue to be strongly argued, particularly between allied or friendly States.<sup>1</sup> Delay and expense are reduced, and expulsion under the immigration laws circumvents the inconveniences of a weak case, the absence of the offence charged from the extradition treaty, and even the lack of a treaty itself.<sup>2</sup> It is significant that modern expulsion laws have been developed with some regard paid to the requirements of due process and to the desirability of a right of appeal. To this extent, these laws reflect the growth of human rights principles and they may be taken as some evidence of contemporary State attitudes to the rights of individuals.

In the past it has often been difficult for one threatened with expulsion to challenge an order or to question its merits. In *R. v. Secretary of State, ex parte Château-Thierry*<sup>3</sup> the Court of Appeal held that under the Aliens Restriction Act 1914 it was wholly within the discretion of the Secretary of State whether or not to allow the alien the privilege of arranging his own departure. The fact that the alien was a political refugee was again a matter for the Minister to consider in his discretion, and it was not for the Court to determine whether the power of deportation might lawfully be used to secure the mutual surrender of military deserters.<sup>4</sup> In effect the Minister might, by designating a particular vessel, secure the alien's departure to any desired country.<sup>5</sup>

Although in this case the tone of the judgment is in favour of an arbitrary and uncontrolled power, other decisions have emphasized the limits, admittedly wide, within which the Home Secretary's discretion is confined. In *Sarno's* case in 1916,<sup>6</sup> the court stated that if it appeared that a misuse of the power conferred upon the Executive was imminent, then the court was free to deal with the matter. In *Sacksteder's* case, two years later, the court again ruled that it might go behind an apparently valid order for the arrest and detention of an alien against whom a deportation order has been made if it is a 'mere sham not made *bona fide*'.<sup>7</sup> By contrast, in *Muller v. Superintendent, Presidency Jail, Calcutta*,<sup>8</sup> the Supreme Court of India expressly held that the fact that a request for

p. 452. Note also the provisions of French law which excuse an alien who fails to depart if he shows that it is impossible for him to leave French territory: *ordonnance de 2 novembre 1945*, article 27; *Dalloz*, 1967, *Somm.* 79 (*Moravek*).

<sup>1</sup> See, for example, the arrangement between the United Kingdom and the Republic of Ireland contained in the Backing of Warrants (Republic of Ireland) Act 1965; see also the inter-N.A.T.O. provisions for the surrender of military deserters: *United Nations Treaty Series*, vol. 199, p. 67; *R. v. Thames Justices, ex parte Brindle*, decision of the Court of Appeal, [1975] 3 All E.R. 71.

For recent developments in Anglo-Irish relations and for a useful summary of past practice, see McCall-Smith and Magee, 'The Anglo-Irish Law Enforcement Report in Historical and Political Context', *Criminal Law Review*, 1975, p. 200.

<sup>2</sup> See *Re D'Emilia*, I.L.R., vol. 24, p. 499.

<sup>3</sup> [1917] 1 K.B. 922.

<sup>4</sup> See also *Abdou v. Attorney-General of Kenya*, I.L.R., 18 (1951), Case no. 80, p. 282; *R. v. Chiswick Police Station Superintendent, ex parte Sacksteder*, [1918] 1 K.B. 578; O'Higgins, 'Disguised Extradition: The Soblen Case', *Modern Law Review*, 27 (1964), p. 521. Cf. *R. v. Zausmer*, (1911) 7 Cr. App. Rep. 41.

<sup>5</sup> Cf. *R. v. Governor of Brixton Prison, ex parte Sliwa*, [1952] 1 All E.R. 187.

<sup>6</sup> *R. v. Governor of Brixton Prison, ex parte Sarno*, [1916] 2 K.B. 742.

<sup>7</sup> [1918] 1 K.B. 578.

<sup>8</sup> I.L.R., 22 (1955) p. 497.



extradition had been made did not fetter the decision of the Government to choose the less cumbersome procedure of expulsion. The Government had a discretion to expel an alien in conformity with its territorial supremacy and no question of good faith could arise merely because the Government had exercised the right of choice which the law conferred.

(iv) *The Soblen case*. In the United Kingdom the *locus classicus* is without doubt the decision of the Court of Appeal in the *Soblen* affair.<sup>1</sup> Dr. Soblen, although admitted in fact to the United Kingdom for urgent medical treatment, was refused leave to land and detained under the Aliens Order 1953.<sup>2</sup> A deportation order was then made against him under Article 20 (2) (b) of that Order on the ground that the Secretary of State deemed his departure to be conducive to the public good. Dr. Soblen challenged the validity of the deportation order on the grounds, *inter alia*, that an alien refused leave to land under Article 1 of the Order could not thereafter be deported under Article 20 and that, even if valid on its face, the order was being used for the unlawful purpose of extraditing a political fugitive for a non-extraditable offence. This challenge was rejected by the Court of Appeal, which held that the provisions for the removal of those refused leave to land and the provisions enabling the deportation of those already admitted were not mutually exclusive, but were 'cumulative and complementary'.<sup>3</sup> It was further held that the Home Secretary might deport an alien to the State of his nationality even though he had fled after conviction for a non-extraditable offence, and even though a request had been received for his return.<sup>4</sup> It was lightly suggested that if the Home Secretary had acted simply at the request of a foreign State, that might be unlawful, but Lord Justice Donovan made the following pertinent comment:<sup>5</sup>

If country A is an ally of country B, each of them may well think it conducive to the public good of their own citizens that they should co-operate to see that a national of one of them who gives defence information to a common potential enemy, should not escape the consequences inflicted upon him by due process of law.

His Lordship also remarked that if the deportation order was to be regarded as invalid, it must be for some other reason than the consequence to which it would

<sup>1</sup> *R. v. Governor of Brixton Prison, ex parte Soblen*, [1963] 2 Q.B. 243. See also Goodhart, 'Extradition and Deportation', *Law Quarterly Review*, 79 (1963), p. 41; O'Higgins, loc. cit. (above, p. 93 n. 4); Thornberry, 'Dr. Soblen and the Alien Law of the United Kingdom', *International and Comparative Law Quarterly*, 12 (1963), pp. 414-74.

<sup>2</sup> Articles 1, 8 (4). The legality of his detention was unsuccessfully challenged in *R. v. Secretary of State, ex parte Soblen*, [1963] 1 Q.B. 829.

<sup>3</sup> This finding clouds the distinction between exclusion and deportation proceedings which even today may have significant consequences for the individual, for the alien who has been admitted benefits fully from the right of appeal against removal and against destination. If, however, it emerges that he was never given leave to land, then he may be removed summarily and without any trial on the merits: Immigration Act 1971, Sch. 2, para. 8. The alien is then once again left to his common law remedy of habeas corpus: *R. v. Governor of Pentonville Prison, ex parte Azam*, [1973] 2 W.L.R. 949, per Lord Denning at p. 960.

<sup>4</sup> Soblen had been convicted and sentenced to life imprisonment in the United States for espionage offences.

<sup>5</sup> [1963] 2 Q.B. 243 at p. 310. See also *Hansard*, H.C. Deb., vol. 664, col. 805.

lead.<sup>1</sup> Lord Denning, however, was somewhat more explicit in his description of the grounds upon which the court exercises control. He said that<sup>2</sup>

... it depends on the purpose with which the act is done. If it was done for an authorised purpose, it was lawful. If it was done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object, it was unlawful . . . Was there a misuse of the power or not? The courts can always go behind a deportation order in order to see whether the powers entrusted by Parliament have been exercised lawfully or no.

If it could be shown that the deportation order was a sham in that the Home Secretary did not genuinely consider it to be in the public interest to expel the alien, then a challenge on these grounds would succeed. But there was no such evidence in this case for attributing to the Home Secretary anything in the nature of a sham or want of bona fides or any unlawful or improper purpose.<sup>3</sup>

The evidentiary burden is thus considerable, and it may well be increased by the Executive's refusal to reveal the evidence relating to its decision. But if that burden could be satisfied, then the court has the power to strike down the deportation order. This illustrates an approach to the power of expulsion which is common in municipal systems and illustrates also the meaning of the presumption that expulsion must follow only from a decision reached 'in accordance with the law'. Due process excludes arbitrariness and this requirement flows from international law itself. This international standard is reflected in the practice of States and in their municipal laws. This is some evidence of a sufficient *opinio juris* and strong support for the proposition that the discretionary power of expulsion is confined by the rules of international law. As in municipal law, so also in determining whether there has been a breach of an international obligation, the fact of delivery up to persecution may bear directly on the question of bona fides. The power of expulsion is a discretionary power limited by reference to its function and, while the margin of appreciation left to States is wide, it is not beyond control. Actual decisions may be a matter of policy, and local courts may consider them non-justiciable,<sup>4</sup> but it does not follow from this that the power may be exercised in bad faith, dishonestly or for some ulterior and unlawful purpose.

#### (e) *Conclusions relating to the function of expulsion*

The preliminary propositions set out above<sup>5</sup> can now be expanded in the light of the first part of this study:

1. States have the 'right', or 'power' or 'competence' to expel aliens.
2. The function of this competence is to protect the essential interests of the State; it is a measure of self-defence.
3. The competence to expel may be exercised in the discretion of the State, and on the grounds which it deems fit.

<sup>1</sup> [1963] 2 Q.B. 243 at p. 307.

<sup>2</sup> *Ibid.*, at p. 302. Cf. Donovan L.J., at p. 308.

<sup>3</sup> [1963] 2 Q.B. 243, at p. 305. Cf. Article 18, European Convention on Human Rights.

<sup>4</sup> *R. v. Governor of Pentonville Prison, ex parte Azam*, [1973] 2 W.L.R. 949, *per* Lord Denning M.R., at pp. 962-3.

<sup>5</sup> At pp. 78-9.

4. However, that discretion is limited as to its extent by reference to its function and purpose. The power must be exercised in good faith and not for some ulterior motive, such as genocide, confiscation of property, or the surrender of an individual to persecution.

## 2. THE JUSTIFICATION FOR EXPULSION

The inquiry into the function and purpose of expulsion has provided the first indication of the limits which confine this discretionary competence of States. The further requirement of justification follows both from the aim and purpose of expulsion, which is the protection of the State, and from the obligation owed by the 'receiving State' to the 'protecting State', which is to accord a certain standard of treatment to the nationals of the latter admitted to its territory.

### (a) *The concept of ordre public*

Continental jurisprudence frequently prescribes as the basis of expulsion reasons of *ordre public*, public safety and public morality. A summary of the meaning to be given to these terms and the conditions of their application may be found in the European Convention on Establishment, 1955.<sup>1</sup> Section I of the Protocol declares that each Contracting Party shall have the right to judge by national criteria the reasons of *ordre public*, national security, public health or morality, the circumstances which constitute a threat to national security or an offence against *ordre public* or morality, and whether the reasons for expulsion are of a 'particularly serious nature'.<sup>2</sup> This is a treaty provision apparently confined to the regime in question, but there are good reasons for taking it as expressing the general standard of international law. As regards both the grounds for expulsion and the separate question whether an individual qualifies within those grounds, the expelling State is in the best position, and is, indeed, the only authority competent to pronounce upon such matters. Practice accepts that it is for each State to determine whether the continued residence of aliens is desirable. In *Ben Tillett's* case in 1898, the arbitrator observed that there was no difference between the parties on this point:<sup>3</sup>

The right of a State to exclude from its territory foreigners when their dealings or presence appears to compromise its security cannot be contested . . . Moreover, the

<sup>1</sup> *European Treaty Series*, No. 19.

<sup>2</sup> See also Section III which provides that the concept of *ordre public* is to be understood in the wide sense generally accepted in continental countries and that this embraces, for example, exclusion for political reasons. However, Contracting States undertake, in the exercise of their rights, to give particular consideration to family ties and periods of residence. There is little authority for approximating *ordre public* to the concept of 'public policy', at least as that is understood in the law of the United Kingdom; see the *caveat* entered by the Editor in the report of the decision of the European Court of Justice in *Van Duyn v. Home Office*, [1975] 1 C.M.L.R. 1, 6, 12; compare the views of the Metropolitan Magistrate in *R. v. Secchi*, [1975] 1 C.M.L.R. 383, 394, with those advanced by Advocate General Mayras in *Bonsignore v. Oberstadtdirektor, Köln*, [1975] 1 C.M.L.R. 472, at pp. 476, 480, 485.

<sup>3</sup> *British Digest of International Law*, vol. 6, p. 124 at p. 147. See also *Expulsion of Missionaries from the Sudan 1964*: Hansard, H.C. Deb., vol. 692, col. 9; *Expulsions from Austria 1963*: H.C. Deb., vol. 682, Written Answers, col. 164; both cited in *British Practice in International Law*, 1964-I, p. 63; 1963-II, p. 127.



State in the plenitude of its sovereignty judges the scope of the acts which lead to the prohibition.

And yet the liberty is not complete. Rules of international law stand at the perimeter and occasionally pass through to impose specific obligations. A considerable margin of appreciation is left to States, but it is a margin that has its own limits. The expelling State is required to balance its own interests against those of the individual. It is, therefore, obliged to take account of the alien's acquired rights or legitimate expectations,<sup>1</sup> and to arrive at a decision which bears a reasonable relationship to the facts.

It has been doubted whether the State is obliged to prove the legitimacy of its reasons for expulsion,<sup>2</sup> and in one case the tribunal held that when expulsion is based on grounds of public policy it will not, as a rule, review the decision of the competent State authorities.<sup>3</sup> But this appears to be a little extreme, and the better view is that the expelling State must show 'reasonable cause'. For *ordre public* is not a term without meaning, and it is not the shorthand description of a sovereign and absolute power. In the *Guardianship of Infants* case, Judge Lauterpacht described it as a 'general legal conception', a 'general principle of law', whose content stood to be determined by reference to 'the practice and experience of municipal law'.<sup>4</sup> Admittedly, his words were directed to the limitation of *ordre public* as an implied reservation to treaty obligations, but the evidence of State practice suggests that a similar view is valid for expulsion matters, even in the absence of specific conventional obligations.

(b) *The requirement of 'reasonable cause'*

Expulsion is a drastic measure which, by its very nature, presupposes substantial justification. In *Zerman's* case<sup>5</sup> the character of the individual expelled was notorious and he suffered no pecuniary loss by reason of his expulsion. Nevertheless, the arbitrator, Sir Edward Thornton, awarded substantial damages. Whereas expulsion on mere suspicion might be warranted in time of war or other disturbance, no such circumstances existed in the present case and 'reasons of safety' could not be advanced as a sufficient ground. If the Mexican Government had had good reasons for the expulsion, then it was at least under an obligation of proving its charges before the Commission. Mere suspicion was disallowed again in the case of *Lorenzo Oliva* in 1903.<sup>6</sup> The decision in this dispute was given by the Mixed Claims Commission established to resolve certain matters between Italy and Venezuela.<sup>7</sup> It should be noted, however, that the

<sup>1</sup> See below, pp. 116-21.

<sup>2</sup> O'Connell, *International Law* (2nd ed., 1970), p. 707; Brownlie, *Principles of Public International Law* (2nd ed., 1973), p. 506.

<sup>3</sup> *Re Hochbaum*, *Annual Digest*, 7 (1933-4), Case No. 134: *Decisions of the Upper Silesian Arbitral Tribunal*, vol. 5, p. 140 at p. 162.

<sup>4</sup> *I.C.J. Reports*, 1958, p. 55 at p. 92. See further below, pp. 146-7.

<sup>5</sup> U.S.A.-Mexico Convention of 1863, case cited in Moore, *International Arbitrations*, vol. 4, p. 3348. See also Whiteman, *Damages in International Law*, vol. 1, at p. 507.

<sup>6</sup> Whiteman, *op. cit.* (previous note), pp. 429-30, 508.

<sup>7</sup> Italy-Venezuela, Protocol of 1903, *United Nations Reports of International Arbitral Awards*, vol. 10, p. 47.

Commission's awards were largely based on the admission of liability by the Venezuelan Government where the claim was for injury to the person and 'wrongful' seizure of property.<sup>1</sup> This same Commission gave the decision in the *Boffolo* case;<sup>2</sup> and the propositions which it there formulated have since been frequently cited: (1) every State possesses the general right of expulsion; but (2) expulsion should only be resorted to in extreme instances and must be accomplished in the manner least injurious to the person affected; (3) the State exercising the power must, when occasion demands, state the reason for such expulsion before an international tribunal, and, an insufficient reason or none being advanced, accept the consequences. The only reasons advanced in the present case were contrary to the Venezuelan Constitution and could not be accepted. Umpire Ralston maintained the distinction between the right to exercise a power and the rightful exercise of that power, and assumed that there was jurisdiction to inquire into the reasons and circumstances of the expulsion.<sup>3</sup>

The Belgium-Venezuela Commission gave a decision to similar effect in the *Paquet* case, and suggested also that the very refusal to give reasons to the government of the foreigner affected characterized the expulsion as arbitrary.<sup>4</sup> However, it is doubtful to what extent the requirement of explicit reasons applies in cases other than those submitted to arbitration. In a recent incident involving the expulsion of United Kingdom citizens from Tanzania, the view was expressed in Parliament that there was in fact no obligation to give reasons for deportation, although here they seem to have been apparent from the circumstances of the case.<sup>5</sup>

It is important that a requirement to give precise reasons should not be confused with an over-all requirement that expulsion should be based on 'reasonable cause'. This may appear to be only a matter of detail, but it gives substance to both the obligation not to proceed in an arbitrary manner and the right to judge reasons of *ordre public* in the light of national criteria. States have not hesitated to protest where the alleged reasons constituted insufficient evidence that a just cause existed. Thus, in *Loubriel's* case in 1923, the United States expressed the opinion that justification allegedly based on 'motives of internal order' and 'reasons of gravity and facts well known to the Government of Venezuela' was too vague, and that it had a right to be informed in greater detail.<sup>6</sup>

<sup>1</sup> Article IV.

<sup>2</sup> *United Nations Reports of International Arbitral Awards*, vol. 10, p. 528.

<sup>3</sup> *Ibid.*, p. 532. The Umpire also placed reliance on statements of principle in Calvo, *Dictionnaire du Droit International*, and on the decisions in *Ben Tillett's* case and the case of *Orazio de Atellis*.

<sup>4</sup> *United Nations Reports of International Arbitral Awards*, vol. 9, p. 323 (1903). See also *Jaurett's* case (1904): Hackworth, *Digest*, vol. 3, p. 690; Whiteman, *Damages in International Law*, vol. 1, pp. 432-5, 506 (settled through diplomatic channels).

<sup>5</sup> *Hansard*, H.C. Deb., vol. 702, Written Answers, col. 145; *British Practice in International Law*, 1964-II, pp. 209-10. Cf. case of *British Subject at Bogotá* 1831: *British Digest of International Law*, vol. 6, p. 112.

<sup>6</sup> Hackworth, *Digest*, vol. 3, pp. 699-700. Cf. Case of *Eugene Wiener*, Moore, *Digest*, vol. 4, pp. 82-5; Whiteman, *Damages in International Law*, vol. 1, p. 425 (although the United States refrained from complaint in this case, it maintained the view that only the proof of facts justifying expulsion was sufficient, and not the simple assertion as to their existence).

Similarly, in the case of *Mr. Sawkins*, who was expelled from Cuba in 1847 for 'reserved political motives which cannot be revealed', the Queen's Advocate advised that a demand should be made for compensation and to secure his return.<sup>1</sup> Again, in *Davidson's* case in 1855, the Queen's Advocate expressed the opinion that the arbitrary expulsion of a British subject who had not been convicted of crime, without any previous legal proceedings, required substantial justification.<sup>2</sup> In *Fürst's* case in 1860 it was noted that the charges raised were of a 'vague and indefinite character, inconsistent with the admitted facts and unsupported by any proof or corroboration whatsoever'.<sup>3</sup> More recently the Secretary of State for the Commonwealth expressed doubt as to the substance of reasons advanced by the Kenyan Government justifying expulsion in terms of the need to root out 'bad weeds' and those who defy the 'call for racial harmony'.<sup>4</sup> Faced with a simple assertion of *ordre public*, governments have tended to go beyond and look to the facts. In 1883 the Law Officers of the Crown considered that whatever may have been the public excitement produced by Salvation Army meetings in Switzerland, there was hardly any ground for contending that the mere presence of two of its officers was a source of danger to the State.<sup>5</sup> By comparison, in *Mr. Gallenga's* case in 1860, the Queen's Advocate observed that there was some evidence to justify the revocation of a residence permit for 'political reasons' in troubled times, and no complaint was made.<sup>6</sup>

The insistence upon justification or reasonable cause which is so clearly common to these different cases emphasizes again the manner in which the competence to expel may be substantially confined; in this instance, by operation of the principle of good faith. More precise limitations will be seen to follow as a consequence of other factors, notably the impression of the concept of *ordre public* and the influence of international standards of treatment.

### (c) *The South African expulsions*

The incidence of civil disturbance is itself instructive in respect of those limits which bind the general class of exceptional State measures. It is accepted in the practice of States that such circumstances may justify the arrest and detention of suspects; but in one case it was advised that a claim might be made for the unreasonable expulsion which followed, unless satisfactory evidence of involvement in the alleged plot was forthcoming.<sup>7</sup> This approach was maintained in

<sup>1</sup> *British Digest of International Law*, vol. 6, p. 113.

<sup>2</sup> *Ibid.*, p. 114.

<sup>3</sup> *Ibid.*, pp. 119-21. In the opinion of the Queen's Advocate, Her Majesty's Government was entitled to require both an apology and adequate pecuniary compensation. See also *Mr. Raphael's* case, above, p. 78.

<sup>4</sup> *Hansard*, H.C. Deb., vol. 750, cols. 97-100, cited in *British Practice in International Law*, 1967, pp. 112-14.

<sup>5</sup> Case of *Miss Charlesworth and Miss Booth*, 1883: *British Digest of International Law*, vol. 6, pp. 167-70. See also regarding the deportation of Jesuit missionaries from Haiti for alleged collaboration in a plot: *Canadian Yearbook of International Law*, 4 (1966), pp. 244-5.

<sup>6</sup> *British Digest of International Law*, vol. 6, p. 119. Mr. Gallenga was a correspondent for *The Times* who had written a number of critical dispatches.

<sup>7</sup> *Gowrie's* case 1896: *ibid.*, p. 178; see also the incident involving the Treaty with the Two Sicilies 1863: *ibid.*, p. 336.



regard to expulsions from Hawaii in the years 1895–8.<sup>1</sup> Martial law might justify exceptional measures, but nothing justified unreasonable detention, maltreatment, and enforced departure.<sup>2</sup> These standards were not only insisted upon in its relations with other States, but they were also applied by the British Government to itself in regard to expulsions from South Africa in 1900. In April of the following year the Government set up a Commission to examine the various claims for compensation. In the view of Her Majesty's Government, the validity of the expulsions derived from the authority of a military commander in a theatre of war, rather than from the sovereign capacity of a State. Nevertheless, the Government agreed, in response to the representations of a number of States, to pay compensation in respect of those who had been expelled without justification although, in the view of the Legal Adviser, this decision was founded in policy rather than strict law.<sup>3</sup> However, the principles generally relied upon are, without doubt, also applicable to expulsions in time of peace.

In preliminary discussions, the Legal Adviser observed that the right of expulsion was one to be exercised in an equitable manner and without undue prejudice or favour to the nationals of one foreign State as compared with the nationals of others.<sup>4</sup> The Foreign Office inclined to the view that the simple fact of expulsion, 'with its more or less inevitable attendant hardships or losses', should not itself be regarded as a sufficient ground for compensation.<sup>5</sup> However, the President-Designate of the Commission was eventually instructed:<sup>6</sup>

to investigate whether the power of expulsion is shown in any case to have been exercised unreasonably or capriciously, or whether it was attended in its exercise with the infliction of any unnecessary hardship. . . . The principle . . . in these assessments should be that of fair and reasonable compensation for direct damage, excluding consequential damages except for natural and proximate consequences of the act complained of . . .

In determining liability, and on the general question of the formulation of defences, the Commission made the following significant points:<sup>7</sup>

Mere opinions—such as that a certain person has no claim to compensation—are of no value, unless supported by reasons and proof. . . . General statements—such as

<sup>1</sup> *British Digest of International Law*, vol. 6, pp. 178–93. On the annexation of Hawaii to the United States the claims were submitted to the United Kingdom–U.S.A. Claims Tribunal, but they were dismissed in 1925 on the ground that no liability had passed to the United States.

<sup>2</sup> The claims proposed were in some cases reduced by reason of the complainants' 'loose talk': *ibid.*, p. 190 (*Thomas and McDowall*).

<sup>3</sup> *Ibid.*, pp. 209 et seq. Claims on behalf of their nationals were presented by the governments of Austria, Belgium, Denmark, France, Germany, Greece, Holland, Italy, Sweden and Norway, Russia, Spain, Switzerland and the United States. A total of £1,294,216 was claimed, and a total of £107,140 was paid out, for the most part in lump sum settlements to the governments of the claimants. See Whiteman, *Damages in International Law*, vol. 1, pp. 497–511, especially on the outcome of the United States claim and the distribution of compensation.

<sup>4</sup> *British Digest of International Law*, vol. 6, p. 209 at p. 213.

<sup>5</sup> *Ibid.*, at p. 214.

<sup>6</sup> *Ibid.*, at p. 216.

<sup>7</sup> *Ibid.*, at p. 218. Note also the general grounds which the claimant was required to establish in order to justify a claim, and the grounds for the disallowance of any such claim: *ibid.*, at pp. 218–19. On the issue of damages, see below, pp. 133–5.

that a certain person was concerned in a plot, or was an 'undesirable'—are likewise useless, without authenticated reasons and proofs.

Despite these encouraging beginnings, the general findings and conclusions of the Commission are open to criticism. In a confidential report, Sir John Ardagh, counsel for the British Government, recorded the difficulties with which he was faced.<sup>1</sup> He noted the lack of precise information and the frequent total absence of materials for justification and defence. On the arrests following the so-called 'Race Course plot', he wrote:<sup>2</sup>

No accusation was made against them and no reason or explanation given for their summary arrest . . . [The] prisoners were neither tried, nor examined, nor told what they were accused of . . . [It] is very greatly to be regretted that in a measure which affected such a large number of foreign subjects, no step, with the exception of communicating with the Consuls, should have been taken to ascertain whether any culpability attached to them individually, or whether there were reasonable grounds for a proceeding of an apparently arbitrary nature, in the event of an appeal to their Governments having to be answered.

Referring to the Commission's awards of £5 and £10, Sir John Ardagh concluded that these were wholly illusory 'as even a solatium or act of grace'.

The Commission's Report<sup>3</sup> proceeded on the dual assumption that a Military Commander has an 'absolute right' of expulsion and that every State has an 'indisputable right to expel aliens whose presence is considered dangerous'. The claims fell into two main classes: on the one hand, those by employees of the Netherlands South African Railway Company, and, on the other hand, the claims of those allegedly implicated in the various plots. Little regard was paid to the first class, and the Commission described the Company as 'a body actively hostile to Great Britain'. In the main, its attention focused on the manner in which the expulsions were carried out and the treatment which was accorded to those expelled. The allegations in these matters were rejected as wholly unfounded by the Commission, which also concluded that there were reasonable grounds for the deportation of all those suspected of complicity in the plots, and that the wide discretion was 'exercised with wisdom and moderation'.<sup>4</sup> In fact, these findings bear little relation to the agreed awards. During the Commission's deliberations, Sir John Ardagh himself negotiated amicable settlements by way of lump sum agreements, and these were in turn approved by the Commission.<sup>5</sup> It is apparent that the British Government accepted the criticisms made by Sir John Ardagh in his confidential report, and recognized the justice contained in his suggested settlements.

<sup>1</sup> *British Digest of International Law*, vol. 6, at pp. 219-21.

<sup>2</sup> *Ibid.*, at pp. 220-1.

<sup>3</sup> *Ibid.*, at pp. 223 ff.

<sup>4</sup> *Ibid.*, at pp. 229-30, 'and that the civilised world owes . . . a debt of gratitude for . . . [the adoption of] a policy of wholesale deportation in preference to one of suppression by force'. For examples of conventional arrangements expressly governing expulsion in time of war or other rupture of relations, see Lapradelle and Politis, *Recueil des Arbitrages Internationaux*, vol. 1, pp. 550, 557.

<sup>5</sup> *British Digest of International Law*, vol. 6, p. 230. The Commission noted that the amounts agreed were larger than it would have awarded.

*(d) Grounds for expulsion in municipal law*

From this more general inquiry attention may now be turned to the particular practice of States, in so far as that is reflected in the provisions of municipal law. The aim is to see what States do, to see what they claim for themselves and what they object to in other States. By way of introduction, the results of the survey so far may be summarized as follows:

1. Expulsion is a measure designed for the protection of the State and for the preservation of *ordre public*.
2. *Ordre public* is a 'general legal conception' and its content is determined by law.
3. Whether or not reasons of *ordre public* exist is open to impartial adjudication in the light of the prescribed function of expulsion and of the international obligations owed by one State to another.
4. However, in practice, a considerable margin of appreciation is left to States to determine whether their national interests are affected by the continued presence of the alien.

Possible limitations upon the power of expulsion can be seen in the provisions of certain municipal systems. The survey which follows is necessarily selective, and it concentrates on four systems which have, on the whole, a reasonably well developed regime governing the entry and exit of aliens. However, the intention is not, without more, to propose as rules of customary international law those which commonly figure as rules of municipal law.<sup>1</sup> Indeed, it may be that the large measure of discretion which municipal systems concede to their respective executive authorities make it less than usually possible to presume *opinio juris* on the basis of actual practice. Nevertheless, there can be no doubt about the important influence which the standards of international law have had on the manner of exercise of the power and on the development of the principle that decisions in such matters be 'in accordance with law'.<sup>2</sup>

(i) *United States practice*. In the United States an Act was passed in 1798 which gave the President authority to order the departure of any alien whom he deemed to be dangerous.<sup>3</sup> In fact, the power was never used and the Act was allowed to expire after two years. Thereafter, and especially towards the end of the nineteenth century, a number of statutes were enacted which introduced deportation as a sanction against those entering in violation of the law.<sup>4</sup> It was not until 1910 that a statute first authorized the removal of lawfully admitted aliens on the ground of subsequent misconduct. Since that date the classes of deportable aliens have been increased, and deportation now operates both as an adjunct to the law on entry and exclusion, and on its own, to secure the removal of those later found, or considered, to be undesirable.<sup>5</sup>

<sup>1</sup> See the cautious approach adopted by Weis in respect to general principles of the law of nationality: *Nationality and Statelessness in International Law* (1956), p. 98; quoted, with comment, by Brownlie, 'The Relations of Nationality in Public International Law', this *Year Book*, 39 (1963), p. 284, at pp. 312-13.

<sup>3</sup> 1 Stat. 570.

<sup>2</sup> See further below, pp. 122-31.

<sup>4</sup> e.g. 24 Stat. 504 (1888); 26 Stat. 1084 (1891).

<sup>5</sup> Gordon and Rosenfield, *Immigration Law and Procedure* (rev. ed., 1974), ch. 4.



The Constitution of the United States makes no mention of any power regarding the entry and removal of aliens, but the Supreme Court has held such power to be 'an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare'.<sup>1</sup> Because such power is inextricably bound up with international relations, the argument continues, therefore its exercise is in the hands of the executive branch and largely beyond the control of the courts, or 'with such opportunity for judicial review . . . as Congress may see fit to authorize or permit'.<sup>2</sup>

In practice, however, the constitutional requirements of 'due process' have been recognized as essential limitations upon the exercise of discretion, and these now guarantee certain procedural rights at least,<sup>3</sup> if not actually imposing any substantive limitation upon the power of Congress to create new classes of deportable aliens.<sup>4</sup> In an early decision, the Supreme Court held that the Government was not competent under statute to take into custody an alleged illegal entrant and to deport him without first giving him an opportunity to be heard. Such hearing did not need to be in accordance with judicial proceedings, but should be that which was appropriate to the circumstances.<sup>5</sup> The full benefits of due process have been denied as a result of the character which the courts have attributed to deportation proceedings.<sup>6</sup> While admitting the severity of the measure, the tendency has been to describe them as civil and not criminal proceedings. Deportation is not, therefore, punishment, and removal on account of conviction for crime cannot come within the prohibition of cruel and unusual punishment in the Eighth Amendment.<sup>7</sup>

In the same way, deportation statutes cannot be unconstitutional by reason of *ex post facto* provisions. In the leading case of *Harisiades v. Shaughnessy* the Supreme Court held that the United States had the power to expel an alien notwithstanding his long residence, that the exercise of this power violated

<sup>1</sup> *Fong Yue Ting v. U.S.*, 149 U.S. 698, 711 (1893); see also *Nishimura Ekiu v. U.S.*, 142 U.S. 651 (1892); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Perdroza-Sandoval v. INS*, 498 F. 2d 1254 (1974).

<sup>2</sup> *Carlsdon v. Landon*, 342 U.S. 524 (1952), and note the dissent of Black J.; *Circella v. Sahli*, 216 F. 2d 33 (1954). See also *per* Brewer J. dissenting in *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893): 'The doctrine of powers inherent in sovereignty is one both indefinite and dangerous. . . . The governments of other nations have elastic powers—ours is fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of despotism' (at p. 737).

<sup>3</sup> Immigration and Nationality Act 1952, 8 U.S.C. s. 1252 (b).

<sup>4</sup> In *Hitai v. INS*, 343 F. 2d 466 (1965) the Court of Appeals, Second Circuit, held that the appellant could not rely on the guarantee of human rights without distinction contained in Article 55 of the United Nations Charter. This provision was not self-executing and the question of immigration was a policy decision of the legislative branch binding on the judiciary.

<sup>5</sup> *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Kaoru Yamataya v. Fisher*, 189 U.S. 86 (1903) (The Japanese Immigrant Case); *Ludeck v. Watkins*, 335 U.S. 160 (1948)—removal of enemy alien not subject to judicial review. Cf. *Netz v. Chuter Ede*, [1946] Ch. 224; *R. v. Bottrill, ex parte Küchenmeister*, [1947] 1 K.B. 41.

<sup>6</sup> *Bugajewitz v. Adams*, 228 U.S. 589 (1913), *per* Holmes J. at p. 591; *Zapp v. District Director of Immigration*, 120 F. 2d 762, 764 (1941).

<sup>7</sup> *Circella v. Sahli*, 216 F. 2d 33 (1954). The alien in question had been born in 1898, had entered the United States in 1902, and was ordered to be deported in 1954. See also *Santelises v. INS*, 491 F. 2d 1254 (1974); cf. *Furman v. Georgia*, 93 S. Ct. 2726, especially *per* Brennan J. at pp. 2742–8.

neither due process nor freedom of speech, and that deportation because of membership of a 'subversive organization' prior to the effective date of the statute did not constitute an *ex post facto* law within the constitutional prohibition.<sup>1</sup> In addition, the alien who is subject to the 'civil' procedure of deportation cannot rely upon the otherwise far-reaching implications of the Supreme Court decision in the *Miranda* case.<sup>2</sup> In criminal prosecutions this decision precludes the use of statements made by a person in custody unless he is first told of his right to remain silent and of his right to have a lawyer present at his interrogation.<sup>3</sup>

Despite these disadvantages, the expulsion process must involve what is sometimes characterized as 'procedural', as opposed to 'substantive' due process. In effect, this preserves the dichotomy generally assumed to exist between the reserved domain of 'sovereign' powers and the requirements of international law standards. In one case the Supreme Court expressly noted that without a hearing there would be no constitutional authority for deportation, and that this constitutional requirement derives from the self-same source as the power of Congress to legislate.<sup>4</sup> In practice, while the remedies available to the alien tend to go only to the *legality* of the order of detention or deportation, and not to the merits,<sup>5</sup> it will be seen that the courts have developed the concept of legality beyond the merely formal meeting of statutory requirements.

It has been estimated that, in the law of the United States, the eighteen

<sup>1</sup> 342 U.S. 580 (1952). Cf. *Mandel v. Mitchell*, 325 F. Supp. 620 (1971; reversed, *sub nom. Kleindienst v. Mitchell*, 408 U.S. 753 (1972)).

<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>3</sup> *Pang v. INS*, 368 F. 2d 637 (1966); *Lavoie v. INS*, 418 F. 2d 732 (1969), cert. den. 400 U.S. 854 (1970); *Valeros v. INS*, 387 F. 2d 921 (1967); *Kung v. District Director*, 356 F. Supp. 571 (1973); Haney, 'Deportation and the Right to Counsel', *Harvard International Law Journal*, 11 (1970), p. 177. Cf. United Kingdom Immigration Act 1971, Sch. 2, para. 4—the duty to answer questions is imposed on all who seek entry. In *U.S. v. Sacco*, 428 F. 2d 264 (1971) it was held that the alien registration acts do not violate the rule against self-incrimination because they are 'essentially non-criminal and regulatory provisions'.

<sup>4</sup> *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49–50 (1950); the Court also held that the provisions of the Administrative Procedure Act 1946 applied to deportation proceedings. This ruling was promptly negated by the Immigration and Nationality Act 1952, s. 242 (b), 8 U.S.C. s. 1252 (b), prescribing an *exclusive* procedure for deportation: *Marcello v. Bonds*, 349 U.S. 302 (1955). However, it has recently been held that the 1946 Act *does* apply to determinations by the Secretary of Labor on whether to issue alien employment certification. Such certification is a necessary pre-condition to the taking up of employment by an alien and it will only be granted if there is not enough local labour 'able, willing, qualified and available' to perform the work sought by the particular alien, and provided that employment of the alien will not adversely affect the working conditions and wages of U.S. workers. See *Secretary of Labor of the U.S. v. Farino*, 490 F. 2d 885 (1973); *First Girl, Inc. v. Regional Manpower Administrator*, 499 F. 2d 122 (1974); *Ratnayake v. Mack*, 499 F. 2d 1207 (1974).

<sup>5</sup> In *Vajtauer v. Commissioner of Immigration, New York*, 273 U.S. 103 (1927) the Court held that want of due process is not established in habeas corpus proceedings merely by showing that the decision is erroneous, and that if there was some evidence supporting the order, that was sufficient. See now the requirement of 'substantial evidence', below, pp. 124–5. Where the alien applies for 'discretionary relief', for example, suspension of deportation, the Attorney-General is not required to give a hearing: 8 U.S.C. s. 1254 (a) (1), (2). In *Jay v. Boyd*, 351 U.S. 345 (1956) the Supreme Court held that the use of confidential information in security or public interest matters on such applications was reasonable; note the dissenting judgments of Warren C.J. (at p. 361), Black J. (at p. 368), Frankfurter and Douglas JJ. (at p. 370).



general classes of deportable aliens entail some seven hundred different grounds for removal.<sup>1</sup> An over-all view of the situation will suffice for present purposes.

The power of expulsion is applicable to all aliens, that is, to 'any person not a citizen or national of the United States'.<sup>2</sup> Any claim to citizenship is to be determined judicially, rather than by an administrative decision, in the deportation proceedings themselves, for the authorities have jurisdiction only if alienage is established.<sup>3</sup> Moreover, if the person concerned establishes a *prima facie* case of citizenship, this can be rebutted only by clear, unequivocal and convincing evidence of fraud or error.<sup>4</sup>

Assuming that the question of alienage is not in issue, the grounds for removal fall into two main categories: (1) those which derive from an entry in breach of the immigration laws, or continuing residence in breach of entry conditions; (2) those which derive from conduct after entry. The statute provides that any alien shall be deported who at any time was within one or more of the classes of aliens excludable under the law at the time of entry.<sup>5</sup> This means, in effect, that the question of 'exclusion' is always open, and the fact that the alien has received permission to enter does not mean that the matter cannot be reviewed.<sup>6</sup>

Additional and extensive grounds for removal apply in respect of the alien's conduct after he has been admitted to the country. The statute provides for the deportation of any alien who, within five years of entry, is convicted of a crime involving 'moral turpitude', and is confined or is sentenced to confinement for a year or more.<sup>7</sup> Other specific crimes and offences may also lead to deportation. These include the offences of carrying or possessing an automatic weapon or sawn-off shotgun<sup>8</sup> and offences involving prostitution<sup>9</sup> or the smuggling of aliens,<sup>10</sup> and also touch one who has become a public charge, in the opinion of the Attorney-General, from causes not affirmatively shown to have arisen after entry.<sup>11</sup>

Wide provisions have also been enacted in order to deal with subversives of various kinds, and deportation is required of aliens both on account of their personal beliefs and advocacy and on account of their membership in or affiliation to certain designated organizations.<sup>12</sup> This covers, for example, anarchists and those who advocate opposition to all organized government, and those who

<sup>1</sup> Gordon and Rosenfield, *op. cit.* (above, p. 102 n. 5), ch. 4, p. 5. The statute declares that all the enumerated grounds for deportation apply retrospectively, and the alien does not benefit from any period of limitation: 8 U.S.C. s. 1251 (d).

<sup>2</sup> 8 U.S.C. s. 1101 (a) (3).

<sup>3</sup> *Pignatello v. Attorney-General*, 350 F. 2d 719 (1965); 8 U.S.C. s. 1105 (a) (5). An application to file a petition for naturalization does not give the alien any status, right or immunity from the initiation of deportation proceedings until the question of naturalization is settled: *Millan-Garcia v. INS*, 343 F. 2d 825 (1965).

<sup>4</sup> *Lim v. Mitchell*, 431 F. 2d 197 (1970).

<sup>5</sup> 8 U.S.C. s. 1251 (a) (1).

<sup>6</sup> *Ibid.*, s. 1251 (a) (2), (3); (c); *Leon v. Murff*, 250 F. 2d 436 (1957). For provisions governing the removal of those who re-enter after deportation without the permission of the Attorney-General, see 8 U.S.C. s. 1252 (f); cf. United Kingdom Immigration Act 1971, sections 15 (5), 16 (1), 24 (1): *R. v. Kelly*, [1966] 1 W.L.R. 1556.

<sup>7</sup> 8 U.S.C. s. 1251 (a) (4); *Circella v. Sahli*, 216 F. 2d 33 (1954); *Hirsch v. INS*, 308 F. 2d 562 (1962); *Guerrero de Nodahl v. INS*, 407 F. 2d 1405, 1406-7; Gordon and Rosenfield, *Immigration Law and Procedure* (1974), ch. 4, pp. 98-115.

<sup>8</sup> 8 U.S.C. s. 1251 (a) (14).

<sup>9</sup> *Ibid.*, s. 1251 (a) (12), (18).

<sup>10</sup> *Ibid.*, s. 1251 (a) (13).

<sup>11</sup> *Ibid.*, s. 1251 (a) (8).

<sup>12</sup> *Ibid.*, s. 1251 (a) (6), (7).



are members of or affiliated to the Communist Party or any other totalitarian party of the United States or any other State, or who advocate the doctrines of world communism, etc. As a general rule, the alien must know what he is doing when he joins a designated organization, and it has been held that it is for the Government to produce evidence of 'meaningful association' with the organization.<sup>1</sup>

The immigration laws of the United States are among the most complex and detailed in the world, although the classes of deportable aliens which those laws lay down are those common to most systems. Deportation is accepted as the most appropriate sanction for (1) those who enter or remain in violation of law; (2) those convicted of serious crime; (3) those who otherwise offend against *ordre public* or public morality; and (4) those who are politically undesirable. The details of the law represent a partial attempt to substitute rules for discretion—if an alien comes within class X, Y or Z then, upon the order of the Attorney-General, he shall be deported.<sup>2</sup> This approach is quite different from that of the law of the United Kingdom, France or Germany, each of which, in its own way, employs the satisfaction of a general condition as the necessary prerequisite to the exercise of discretion and leaves a wide margin of appreciation to the executive to order deportation in 'security' cases.<sup>3</sup>

Expulsion under the United States law depends greatly upon the individual's satisfying certain objective criteria. Whether these criteria exist is clearly a matter of fact which is capable of impartial determination, far more so than the question whether an alien's removal is 'conducive to the public good', or whether he 'constitue une menace pour l'ordre public' or whether 'seine Anwesenheit erhebliche Belange [des Staates] aus anderen Gründen beeinträchtigt'. But this first impression of control given by United States law is a little deceptive. Although the fact of deportability must be established by clear, unequivocal and convincing evidence, it will be seen that the powers of the Executive are less closely confined where the alien applies for 'discretionary relief', such as suspension of deportation, adjustment of status to that of permanent resident, or voluntary departure.

(ii) *United Kingdom practice*. Although it is now generally assumed that the power to expel aliens is inherent in every sovereign and independent nation, it was never at any time very clear whether the exercise of this power lay within the prerogative of the Crown. There are a number of early dicta to the effect that the Crown may expel even alien friends.<sup>4</sup> There are also a number of historical examples,<sup>5</sup> but little use seems to have been made of any such preroga-

<sup>1</sup> *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963); *Rowoldt v. Perfetto*, 355 U.S. 115, 120 (1957). Cf. *Bridges v. Wixon*, 326 U.S. 135, 143 (1945); Konvitz, *Civil Rights in Immigration* (1953), pp. 114-22.

<sup>2</sup> 8 U.S.C. s. 1251 (a).

<sup>3</sup> See the criticism of the non-justiciability of 'security' matters in the United Kingdom by Street, 'The Prevention of Terrorism (Temporary Provisions) Act 1974', *Criminal Law Review*, 1975, p. 192 at pp. 195-6.

<sup>4</sup> e.g. Blackstone, *Commentaries*, vol. 1, p. 366; Chitty, *Law of the Prerogatives of the Crown* (1820), p. 49.

<sup>5</sup> e.g. the expulsion of the Jews in 1290. See also Craies, 'The Right of Aliens to enter British Territory', *Law Quarterly Review*, 6 (1890), p. 27; Sibley and Elias, *The Aliens Act and the Right*

tive in the years after the Revolution of 1688. What power there was resided in statute, the purpose of which seems to have been to enact the power, rather than to declare its continuing existence.<sup>1</sup> In *Attorney-General for Canada v. Cain*,<sup>2</sup> however, the Privy Council did not doubt that the Crown possessed the power to expel even a friendly alien from Canada, and to remove him to the country whence he came. The Board expressed the further view that, in the grant of the privilege of entry, the Crown might attach whatever conditions it deemed fit. Since 1905, the power of expulsion in the United Kingdom has been regulated by statute, but there are many more recent decisions which tend to reflect this return to primitive notions of 'sovereign' rights.<sup>3</sup>

The Aliens Act 1905 introduced a limited statutory power of expulsion. It provided (1) that if an alien was convicted of an offence for which he was liable to imprisonment without the option of a fine, the court might recommend his expulsion, either in addition to or in lieu of sentence;<sup>4</sup> (2) that if an alien were found within twelve months of his last arrival to be in receipt of poor relief, or to be living in insanitary conditions due to overcrowding, or to have been convicted in a foreign country for an extradition crime, then a court might, on proceedings taken, certify the facts to the Secretary of State.<sup>5</sup> The primary purpose of this Act was to relieve the social cost of immigration, particularly the maintenance at public expense of the alien prison population. There was no time limit for the expulsion of criminal aliens, but it is to be noted that the Secretary of State might only order expulsion after due recommendation or certification by the courts.<sup>6</sup> In the years to 1914 some 2,866 expulsion orders were made on the recommendation of a court, and there is some evidence of a corresponding reduction in the alien prison population. Most of the recommendations were carried out, although in some few cases no order was made in the light of various considerations, such as the youth of the offender, lack of friends in or connection with any other country, and long residence in the United Kingdom.<sup>7</sup>

With the outbreak of the First World War, control of aliens was established on a new basis, and within one day there was passed an Act requiring all aliens to register with the police and giving the Home Secretary power to exclude or

*of Asylum* (1906), pp. 70-1 and *passim*; Thornberry, 'Dr. Soblen and the Alien Law of the United Kingdom', *International and Comparative Law Quarterly*, 12 (1963), p. 414; Haycraft, 'Alien Legislation and the Prerogative of the Crown', *Law Quarterly Review*, 13 (1897); *British Digest of International Law*, vol. 6, pp. 83 et seq.

<sup>1</sup> e.g. 33 Geo. III c. 4; 45 Geo. III c. 155; see *British Digest of International Law*, vol. 6, pp. 98-100.

<sup>2</sup> [1906] A.C. 542, 546. Lord Atkinson based himself specifically on Vattel, *Law of Nations*, vol. 1, s. 231; vol. 2, s. 125.

<sup>3</sup> See the cases involving alien enemies: *Netz v. Chuter Ede*, [1946] Ch. 224; *R. v. Bottrill, ex parte Küchenmeister*, [1947] 1 K.B. 41, *per* Scott L.J., at p. 51; see also remarks of Lord Denning M.R., in *Schmidt v. Secretary of State*, [1969] 2 Ch. 149, 168-9, 171, and *R. v. Governor of Pentonville Prison, ex parte Azam*, [1973] 2 W.L.R. 949, 960, 963. Cf. Opinion of the Assistant Under-Secretary of State, 1901, *British Digest of International Law*, vol. 6, p. 211.

<sup>4</sup> Section 3 (1) (a).

<sup>5</sup> Section 3 (1) (b).

<sup>6</sup> On the deficiencies of the recommendation procedure in practice, see Gainer, *The Alien Invasion* (1972), pp. 203-6; also, Home Office Report, *Expulsion of Aliens*, 1914, and the Reports of the preceding years.

<sup>7</sup> e.g. Home Office Reports, 1908, 1911, 1914.



deport any alien without appeal.<sup>1</sup> As amended in 1919,<sup>2</sup> this statute and the Aliens Orders made thereunder remained the basis of control until 1973. In each case, leave to land was required and this might be given subject to conditions, for example, as to registration with the police or prohibiting employment.<sup>3</sup> It appears to have been completely within the discretion of the Secretary of State whether to revoke, vary or cancel such conditions.<sup>4</sup> Similarly, extensive powers were granted to order the deportation of an alien, either on the recommendation of the court which had convicted him of an offence punishable with imprisonment, or in circumstances in which the Home Secretary deemed such deportation to be conducive to the public good.<sup>5</sup> In most cases, the court's recommendation could be challenged on appeal against sentence, and occasionally account would be taken of mitigating factors such as the possibility of persecution,<sup>6</sup> and length of residence in the United Kingdom.<sup>7</sup> But after 1914 the Home Secretary's power was no longer tied to the recommendation of a court. He was free to order deportation on the grounds of public good, and this he might do regardless of recommendation, regardless even of conviction.<sup>8</sup> Although the courts declared their jurisdiction to go behind a deportation order in the case of a 'misuse' or 'unlawful' exercise of the power, in practice the evidentiary burden was difficult to satisfy and no allegation of improper purpose was ever upheld.<sup>9</sup> The courts refused to sit on appeal from the Home Secretary

<sup>1</sup> Aliens Restriction Act 1914; *Parliamentary Debates*, 5th Series, 1914, vol. 65, cols. 1986-90. Cf. the provision for appeal to the Privy Council in the Aliens Act 1848: *British Digest of International Law*, vol. 6, p. 100.

<sup>2</sup> Aliens Restriction (Amendment) Act, 1919.

<sup>3</sup> Aliens Order 1953, Article 5.

<sup>4</sup> *Ibid.*, Article 5 (3); but note Lord Denning's remarks on the premature withdrawal of permission to remain in *Schmidt v. Secretary of State*, [1969] 2 Ch. 149, at pp. 170-1. For application of the Aliens Order 1920 and the Special Restriction (Coloured Alien Seamen) Order 1925, and their effect on all coloured seamen regardless of nationality, see Little, *Negroes in Britain* (1947), pp. 63-7.

<sup>5</sup> Aliens Order 1953, Article 20 (1). Under Article 21 the Home Secretary might give directions for the alien's removal, with any dependants, on a ship or aircraft, and might specify the country to which he was to be returned. The alien was liable to be detained whenever a deportation order had been made and whenever consideration was being given to the recommendation of a court.

<sup>6</sup> *R. v. Zausmer*, (1911) 7 Cr. App. Rep. 41.

<sup>7</sup> *R. v. Kleis*, (1910) 4 Cr. App. 101; *R. v. Friedmann*, (1914) 10 Cr. App. Rep. 72; and cf. *R. v. Grunspan*, (1913) 8 Cr. App. Rep. 269. These cases were all decided under the Aliens Act 1905, when the recommendation of a court was an essential pre-condition to expulsion. For more recent expression of judicial attitudes to the recommendation for deportation, see *R. v. Caird*, (1970) 54 Cr. App. Rep. 499, 510; *R. v. Baidoo*, (1971) 55 Cr. App. Rep. 253, 255; *R. v. Anderson*, [1972] 1 Q.B. 304.

<sup>8</sup> Expulsion for breach of landing conditions might be ordered either on public good grounds or on the recommendation of a court after conviction for such a breach under Aliens Order 1953, Articles 25 and 26. After 1956, and in pursuance of its obligations under the European Convention on Establishment, the Government permitted to aliens resident for two years or more the privilege of making representations before the Chief Metropolitan Magistrate against any decision to deport. The Magistrate in turn might make his recommendation to the Home Secretary which, although not binding, was followed in practice: *Report of the Wilson Committee on Immigration Appeals*, Cmnd. 3387, para. 53, Appendix VII, Table 7.

<sup>9</sup> *R. v. Governor of Brixton Prison, ex parte Sarno*, [1916] 2 K.B. 742; *R. v. Secretary of State, ex parte Château-Thierry*, [1917] 1 K.B. 922; *R. v. Chiswick Police Station Superintendent, ex parte Sacksteder*, [1918] 1 K.B. 578; *R. v. Governor of Brixton Prison, ex parte Bloom*, (1920) 124 L.T. 375.



and declined even to demand that deportation proceedings provide opportunity for a hearing within the minimum requirements of the rules of natural justice.<sup>1</sup> In those days a very wide margin of appreciation was conceded to the executive.

Under the Commonwealth Immigrants Act 1962 the Secretary of State was empowered for the first time to order the deportation of a Commonwealth citizen, but this power was limited to the occasion of a recommendation by the court which had convicted him of an offence punishable with imprisonment.<sup>2</sup> The power of the court was also limited, and no recommendation was to be made against such citizen who satisfied the court that he was 'ordinarily resident' in the United Kingdom at the date of conviction and that he had been continuously so resident for at least five years prior to that date.<sup>3</sup> This Act also provided for the prosecution of Commonwealth citizens who entered or remained in breach of the immigration laws, and they might be convicted and, on the recommendation of the court, deported.<sup>4</sup> The prosecution, conviction and recommendation were essential pre-conditions to an exercise of the power of expulsion, and it was not until the Immigration Act 1971 that a general power to deport for the public good was introduced in respect of Commonwealth citizens. It was recommended in 1965<sup>5</sup> that the Home Secretary should have the power to repatriate those who evaded immigration controls or who remained beyond their permitted time, and this was eventually enacted in the Immigration Appeals Act 1969.<sup>6</sup>

The Act of 1962, in fact, made it no offence for Commonwealth citizens to enter the United Kingdom without being examined by an immigration officer. If they did so, and remained unexamined for the statutory period of twenty-four hours, then they could not be prosecuted or required to submit to examination. They could then only be deported if subsequently convicted for a criminal offence and recommended for deportation.<sup>7</sup> In 1969, the Immigration Appeals Act introduced rights of appeal against, *inter alia*, a decision to vary conditions

<sup>1</sup> *R. v. Inspector of Leman Street Police Station, ex parte Venicoff*, [1920] 3 K.B. 72; *Musson v. Rodriguez*, [1953] A.C. 530; *Schmidt v. Secretary of State*, [1969] 2 Ch. 149. Cf. *Ridge v. Baldwin*, [1964] A.C. 40. The main categories of aliens deported on public good grounds were the mentally disordered, criminals in respect of whom no recommendation for deportation had been made by the court, 'destitute malingerers', 'persistently unsatisfactory workers', aliens who refused to leave after their permission had expired, students who refused to study, and security cases: *Hansard*, H.C. Deb., vol. 649, cols. 423-4.

<sup>2</sup> Commonwealth Immigrants Act 1962, section 6. The power was limited to those who had attained the age of seventeen: *ibid.*, section 7 (1). British protected persons and Irish citizens were also liable to be deported, but provision was made for appeal against the recommendation as against a sentence of the court: *ibid.*, section 8 (4).

<sup>3</sup> *Ibid.*, section 7 (2). In calculating the period, no regard was to be paid to continuous periods of detention exceeding six months. The limited statutory recognition of a 'vested right of residence' is carried over into the new law; see below, p. 111.

<sup>4</sup> *Ibid.*, section 4 (1).

<sup>5</sup> *Immigration from the Commonwealth*, Cmnd. 2739, para. 25.

<sup>6</sup> See now Immigration Act 1971, section 3 (5).

<sup>7</sup> Note *D.P.P. v. Bhagwan*, [1970] 3 W.L.R. 501, in which the House of Lords adopted a restricted interpretation of the 1962 Act in view of the 'common law rights of British subjects' to enter the United Kingdom. See also, *R. v. Governor of Pentonville Prison, ex parte Azam*, [1973] 2 W.L.R. 949; Immigration Act 1971, sections 4 (2), 16 (1), (2); Sch. 2, para. 9.

of entry for both aliens and Commonwealth citizens, and any decision to deport for breach of conditions or otherwise without a recommendation of the court. For the first time an alien might appeal against a decision that his removal was conducive to the public good, and both adjudicators and the Immigration Appeals Tribunal were empowered to review any discretionary decision, and required to allow the appeal where they were of the opinion that the discretion should have been exercised differently.<sup>1</sup> This statutory innovation gave belated recognition to the substantial requirements of due process. It accepted the principle that the executive's power is one of controlled discretion and reflected the impact of international standards, particularly the pressure exerted by developments in the light of the European Convention on Human Rights.

Despite the recommendations of the Wilson Committee on Immigration Appeals,<sup>2</sup> the Government of the day attempted to grant an appeal against decisions or actions of the Home Secretary which were based on political reasons, and also those based on reasons of national security. A special procedure was introduced, with appeal directly to a specially constituted Tribunal.<sup>3</sup> But this was no appeal in the ordinary sense of the word: evidence could be presented by the Government in the absence of the appellant and his advisers,<sup>4</sup> and the Tribunal's decision was not binding on the Secretary of State.<sup>5</sup> This was well illustrated by the *Dutschke* affair in 1970,<sup>6</sup> where the Tribunal upheld the decision to refuse permission to remain on the ground that the appellant was 'likely to be a security risk in the future'. The new law has abandoned any formal procedure in security and political cases, and the Government's view was expressed by Lord Windlesham in the House of Lords:<sup>7</sup>

These cases, by their very nature, require political judgements to be made as to what does or does not constitute a threat to the security of the state or what amounts to undesirable political activity.

<sup>1</sup> Immigration Appeals Act 1969, section 8 (1); see now Immigration Act 1971, section 19.

<sup>2</sup> Cmnd. 3387, paras. 143-4.

<sup>3</sup> Immigration Appeals Act 1969, section 9. For aliens the special procedure was applicable not only in national security cases, but also where the decision or action was taken wholly or mainly in the interests of the relations between the United Kingdom and any other country or otherwise on grounds of a political nature: Aliens (Appeals) Order 1970 (S.I. 1970, No. 151), article 8.

<sup>4</sup> Immigration Appeals Act 1969, section 9 (3); Aliens (Appeals) Order 1970, article 8 (3). The Wilson Committee objected to just this sort of procedure: Cmnd. 3387, para. 144. Cf. *Hansard*, H.C. Deb., vol. 754, col. 457.

<sup>5</sup> Immigration Appeals Act 1969, section 9 (2); Aliens (Appeals) Order 1970, article 8 (2).

<sup>6</sup> For a critical analysis of the procedure and of the decision of the Tribunal, see Hepple, 'Aliens and Administrative Justice: The Dutschke Case', *Modern Law Review*, 34 (1971), p. 501. See also, the *Guardian*, 19, 23 December 1970; 9, 19, 20 January 1971; *The Times*, 30 November 1970; 9 January 1971; the *Sunday Times*, 1, 8 November, 18 December 1970.

<sup>7</sup> *Hansard*, H.L. Deb., vol. 320, col. 998; H.C. Deb., vol. 819, cols. 375-7. Provision has now been made for informal representations to be put before an advisory committee: *ibid.* The procedure was put in motion in the case of *Franco Caprino* (see the *Guardian*, 4, 11, 14 January 1975; *The Times*, 23 January 1975), but the decision to deport was revoked before any representations were made to the committee: the *Guardian*, 25 January 1975. Cf. the cases of two United States citizens, *Agee* and *Hosenball*: see, for example, *The Times*, 17, 19 November 1976. In debate on the Prevention of Terrorism Bill the Home Secretary said that 'exclusion orders are concerned with national security, rather than with judicial issues': *Hansard*, H.C. Deb., vol. 881, col. 637.



Although he enjoys no legal right of appeal, the non-patrial alien or Commonwealth citizen remains free to challenge the legality of his detention by way of the writ of habeas corpus. This is not, however, entirely satisfactory and the procedure involved tends to remove the 'margin of appreciation' farther from control.

The Immigration Act 1971 applies controls to all non-patrials,<sup>1</sup> and provides that they shall be liable to deportation (1) for failure to comply with a condition attached to their leave to enter or for failure to depart at the expiry of such leave;<sup>2</sup> (2) if the Secretary of State deems deportation to be conducive to the public good;<sup>3</sup> (3) if another person to whose family he or she belongs is or has been ordered to be deported;<sup>4</sup> (4) if, after attaining the age of seventeen, and having been convicted for an offence punishable with imprisonment, he is recommended for deportation by the court.<sup>5</sup> In addition, specific powers are laid down for the summary removal of 'illegal entrants',<sup>6</sup> and for the compulsory repatriation of mental patients.<sup>7</sup>

The Immigration Act does recognize the notion of a 'vested right of residence', at least as regards Commonwealth and Irish citizens who were ordinarily resident in the United Kingdom at the entry into force of the Act.<sup>8</sup> They may not be deported on grounds conducive to the public good if they are ordinarily resident at such date, if they are so resident at all times thereafter and at the date of the Secretary of State's decision.<sup>9</sup> Once they have been ordinarily resident for five years, then they are also immune from deportation on any ground at all.<sup>10</sup> It is

<sup>1</sup> The power to deport does not apply to any diplomatic agent or other person entitled to like immunity: Immigration Act 1971, s. 8 (3); Immigration (Exemption from Control) Order 1972 (S.I. 1972, No. 1613), articles 3, 4.

<sup>2</sup> Immigration Act 1971, s. 3 (5) (a).

<sup>3</sup> Ibid., s. 3 (5) (b); this is the first time that 'public good' grounds have been applied to Commonwealth citizens.

<sup>4</sup> Immigration Act 1971, section 3 (5) (c).

<sup>5</sup> Ibid., section 3 (6). A person is deemed to have attained the age of seventeen at the time of conviction if he appears to the court to have done so, on consideration of any available evidence: *ibid.*, section 6 (3) (a).

<sup>6</sup> See *R. v. Governor of Pentonville Prison, ex parte Azam*, [1973] 2 W.L.R. 949 (C.A.); [1973] 2 All E.R. 765 (H.L.).

<sup>7</sup> Immigration Act 1971, section 30, amending Mental Health Act 1959, section 90. This power applied previously only to aliens; it may be exercised where the Home Secretary is satisfied that it is in the interests of the patient to remove him. Cf. earlier agreements for the mutual retention of lunatics: *British Digest of International Law*, vol. 6, pp. 104-6. Provision is also made for 'assisted repatriation': section 29. Payment of expenses is not to be made unless it is shown that it is in the individual's interest to leave the United Kingdom to reside permanently elsewhere, and that he wishes to do so; see *Hansard*, H.L. Deb., vol. 320, col. 1000. On earlier practices which secured the 'voluntary' departure of a person from the Realm, see O'Higgins, 'Voluntary Deportation', *Criminal Law Review*, 1963, p. 680; *British Digest of International Law*, vol. 6, p. 98; Habeas Corpus Act 1679, sections 11, 12 and 13; *R. v. Ayu*, [1959] 1 W.L.R. 1264; *R. v. McCartan*, [1958] 1 W.L.R. 933; *Yager v. Musa*, [1962] Crim. L. Rev. 240; *R. v. East Grinstead JJ., ex parte Doeve*, [1968] 3 W.L.R. 920.

<sup>8</sup> Immigration Act 1971, section 7 (1); cf. Commonwealth Immigrants Act 1962, section 7 (2), now repealed. Resident aliens are to be considered as having received indefinite leave to land and to remain: Immigration Act 1971, section 1 (2), but they still continue to be liable to deportation.

<sup>9</sup> Immigration Act 1971, section 7 (1) (a).

<sup>10</sup> Ibid., section 7 (1) (b), (c). In calculating the five-year period, similar principles on imprisonment apply to those under the earlier legislation: *ibid.*, section 7 (3), (4). Cf. the use of a twenty-year residence requirement as a condition of immunity from exclusion from Great Britain in



for the individual concerned to show that he comes within the benefit of these exceptions,<sup>1</sup> but it is provided that if he has at any time become ordinarily resident in the United Kingdom, he is not to be treated as having ceased to be so merely because he remained in breach of the immigration laws.<sup>2</sup>

A right of appeal is granted to any non-patrial who is adversely affected by a decision to restrict or vary the conditions of his admission.<sup>3</sup> There is one important exception: no appeal lies if the Secretary of State certifies that the individual's departure would be conducive to the public good, as being in the interests of national security or of the relations between the United Kingdom and any other country, or for reasons of a political nature.<sup>4</sup>

Where a deportation order is made on the recommendation of a court, then there is no appeal within the statutory system. Any court which has the power to sentence the individual for the offence may recommend deportation, unless the court commits him to be sentenced or further dealt with by another court.<sup>5</sup> No deportation order may be made while it is still open to the person concerned to appeal against the relevant conviction, sentence or recommendation, or while such appeal is pending.<sup>6</sup> The Immigration Rules set out the factors to be considered in deciding whether or not to implement the recommendation of the court and it is emphasized that in each case the public interest is to be balanced against any compassionate circumstances.<sup>7</sup>

Finally, deportation may be ordered for breach of the conditions of admission, or generally on grounds relating to the public good.<sup>8</sup> In the former case, the respect of a citizen of the United Kingdom who may be suspected of involvement in terrorism: Prevention of Terrorism (Temporary Provisions) Act 1974, section 3 (4).

<sup>1</sup> Immigration Act 1971, section 7 (5).

<sup>2</sup> Ibid., section 7 (2). See the interpretation of this provision adopted by Lord Denning M.R. in *R. v. Governor of Pentonville Prison, ex parte Azam*, [1973] 2 W.L.R. 949, 958-9, adopted and followed by the Immigration Appeal Tribunal in *Secretary of State v. Aluko*, [1974] Imm. A.R. 90.

<sup>3</sup> Immigration Act 1971, sections 3 (3) (a); 14.

<sup>4</sup> Ibid., section 14 (4); *Statement of Immigration Rules for Control after Entry: Commonwealth Citizens*, 1973 H.C. No. 80, paras. 4-5, 27; *ibid.*, *E.E.C. and other Non-Commonwealth Nationals*, 1973 H.C. No. 82, paras. 4-5, 25. On the continuing availability of habeas corpus, see *R. v. Governor of Brixton Prison, ex parte Soblen*, [1963] 2 Q.B. 243; above, pp. 94-5; *R. v. Governor of Pentonville Prison, ex parte Azam*, [1973] 2 W.L.R. 949. Note, however, the emphasis which is given to *subjective* powers of appreciation in the Prevention of Terrorism (Temporary Provisions) Act 1974, esp. sections 1 (2), 3 (1), (2); cf. *Liversidge v. Anderson*, [1942] A.C. 206.

<sup>5</sup> e.g. committal to the Crown Court under the Magistrates Courts Act 1952, section 29, as amended by the Courts Act 1971, section 56, Sch. 8, para. 3. See also Crompton, 'The Power to Recommend Deportation', *Justice of the Peace*, 126 (1962), p. 660; Rogerson, 'Deportation', *Public Law*, 1963, p. 305; Zellick, 'The Power of the Courts to Recommend Deportation', *Criminal Law Review*, 1973, p. 612.

<sup>6</sup> Immigration Act 1971, section 6 (2), (4), (5); 1973 H.C. No. 80, para. 35; 1973 H.C. No. 82, para. 42. A person convicted on indictment may appeal against the recommendation to the Court of Appeal (Criminal Division), with leave of that Court (Criminal Appeal Act 1968, sections 9, 11 (1)), and a person convicted by a magistrates' court may appeal against the recommendation to the Crown Court (Magistrates Courts Act 1952, section 83 (1), (3), as amended by the Courts Act 1971, section 56, Sch. 9).

<sup>7</sup> 1973 H.C. No. 80, paras. 38-41; 1973 H.C. No. 82, paras. 45-8; *Derrick v. Secretary of State*, [1972] Imm. A.R. 109; *Jordan v. Secretary of State*, [1972] Imm. A.R. 201.

<sup>8</sup> Immigration Act 1971, sections 3 (5) (a), (b). No appeal lies in national security or political cases: *ibid.*, section 15 (1).

Immigration Rules declare that deportation will normally be the proper course, although the merits will always be considered.<sup>1</sup> An appeal may be made to the adjudicator in the first instance, and thence with leave to the Immigration Appeals Tribunal.<sup>2</sup> Deportations on the ground of public good will generally occur in two types of case. In the first, deportation in effect will be on the ground of criminality, for example, where the individual has been convicted, but the court has made no recommendation, or where criminal activities are only suspected and not proven. Other grounds, such as vagabondage or living off social security, may also be relevant. Where deportation is ordered, then there is a right of appeal direct to the Tribunal,<sup>3</sup> save in those cases directly involving national security or political reasons.<sup>4</sup> Here the individual must rely, if at all, on the common law remedies, such as habeas corpus.<sup>5</sup>

The grounds for removal of aliens in United Kingdom law bear obvious similarities to those current in the municipal law of the United States of America. They may be summarized as follows:

1. Entry in breach of law.
2. Breach of the conditions attached to permission to land.
3. Involvement in criminal activities.
4. Offences against *ordre public*, including political matters and matters affecting national security.

In respect to the fourth general category, United Kingdom law is remarkable for the wide measure of discretion which it leaves to the executive; it is only with difficulty that such areas may be subjected to the control of detailed rules.

(iii) *Other regimes*. Regimes for the control of aliens within national frontiers vary considerably between States, and in the countries of continental Europe the system of residence permits is a common feature. For example, in France, three categories of permits are employed, involving distinctions between temporary, ordinary and privileged residents.<sup>6</sup> The permit for privileged residents constitutes recognition of the special status acquired by aliens long established in

<sup>1</sup> 1973 H.C. No. 80, para. 42; 1973 H.C. No. 82, para. 49; *Secretary of State v. Aluko*, [1974] Imm. A.R. 90.

<sup>2</sup> Immigration Act 1971, section 15 (1); Sch. 3, paras. 2, 3. No order of deportation may be implemented pending the outcome of any appeal, but detention or control of the appellant may be required. See also the Immigration Appeals (Procedure) Rules 1972 (S.I. 1972, No. 1684).

<sup>3</sup> Immigration Act 1971, section 15 (7) (a); *Derrick v. Secretary of State*, [1972] Imm. A.R. 109.

<sup>4</sup> Immigration Act 1971, section 15 (3). On appeals against destination, see below, p. 130.

<sup>5</sup> See below, pp. 129-30.

<sup>6</sup> Ordonnance du 2 novembre 1945. E.E.C. nationals are subject to their own regime; see, for example, ordonnance du 28 août 1969 (D. 1969. 335); décret du 5 janvier 1970 (D. 1970. 54); décret du 25 mai 1971 (D. 1971. 227); ordonnance no. 72-1242 de 29 décembre 1972 (D. 1973. 58); loi no. 73-628 du 10 juillet 1973 (J.O. 11 juillet 1973). Under the Franco-Algerian Agreement of 27 December 1969 Algerians also reside in France under *un régime spécifique privilégié*. They are issued with a special *certificat de résidence* allowing them to travel, reside and work freely. It has been held that this certificate differs not only in name but also in nature from the ordinary *carte de séjour*: Ch. Crim., Aix-en-Provence, (*Kheili Lakhaar ben Brahim*), 1 March 1973, *Recueil Dalloz Sirey*, 1973, (2).



France. It may be issued to aliens with uninterrupted residence of at least three years, who were aged thirty-five or more at the time of admission.<sup>1</sup> It is valid for ten years and is renewable as of right (*en plein droit*). Its validity extends to the whole of metropolitan France and it cannot be restricted by individual measures, although residence in certain *départements* may be curtailed. The holders of these permits are dispensed from the *cautio judicatum solvi*,<sup>2</sup> and they may be deprived of their status only by decision of the Minister of the Interior. In addition, they are not subject to *refoulement* as a consequence of the withdrawal of or failure to renew their permit, and they may be dealt with only in expulsion proceedings.<sup>3</sup>

In the Federal Republic of Germany, the residence of aliens is also made subject to possession of a residence permit (*Aufenthaltserlaubnis*).<sup>4</sup> There is no express provision for a hearing on applications for such permits, but this is required indirectly by Article 103 of the Constitution (*Bonner Grundgesetz*, 1949), which leads in turn to the possibility of an appeal against a prejudicial decision.<sup>5</sup> Residence permits may be applied for either before or after admission, although there is no appeal in the former case.<sup>6</sup> Work permits (*Arbeitserlaubnisse*) are also required, as in France, and recent legislation provides that these may be either restricted to a particular job with a specified employer, or unlimited.<sup>7</sup> Unrestricted work permits may be issued where the applicant has been regularly employed for the last five years, where he has married a German national who is ordinarily resident in the Federal Republic, where he is ordinarily resident himself and has been granted privileged status (*Aufenthaltsberechtigter*), or where he has been recognized as a refugee by the German authorities.<sup>8</sup> The special permit is valid for five years and, after ten years residence, is subject to no further time limit.<sup>9</sup> Unless the alien is in an exempted category, the issue of work permits generally is conditional on possession of the requisite residence permit, but a work permit may also be issued to one whose deportation has been temporarily suspended.<sup>10</sup>

<sup>1</sup> Ordonnance du 2 novembre 1945, article 16.

<sup>2</sup> *Ibid.*, article 17. There are also additional advantages in matters of employment.

<sup>3</sup> *Ibid.*, article 18. The bearer automatically loses his status if absent from France for six months or more without previous authorization: *ibid.*, modified by décret du 14 août 1968. On 'acquired rights' see further below, pp. 116 et seq.

<sup>4</sup> *Ausländergesetz* 1965 (hereinafter *AuslG.*), Article 2 (1), 1965 BGBl. I, 353. Special provision is also made for E.E.C. nationals; see Article 2 (3) and *Aufent/EWG*, 1969 BGBl. I, 1, implementing E.E.C. Directive 64/221, Article 3 (1). Entry without a permit, where that is required, and residence without such a permit are punishable with a fine and up to one year's imprisonment: *AuslG.*, Article 47 (1), (2). *Arbeitserlaubnisse* may be limited in time, restricted to particular areas or made subject to other conditions: *ibid.*, Article 7.

<sup>5</sup> *Grundgesetz*, Article 19 (4); Schiedermair, *Handbuch des Ausländerrechts der Bundesrepublik Deutschland* (1968), pp. 214-27; *AuslG.* Article 6 (1).

<sup>6</sup> *AuslG.* Article 5; Schiedermair, *op. cit.* (previous note), p. 226.

<sup>7</sup> *Verordnung über die Arbeitserlaubnis für nichtdeutsche Arbeitnehmer*, 1971 BGBl. I, 152, Articles 1, 3.

<sup>8</sup> *Ibid.*, Article 2.

<sup>9</sup> *Ibid.*, Article 4. The law declares the circumstances in which a work permit may be refused or withdrawn (*ibid.*, Articles 6, 7), but any such decision must be supported by reasons (*ibid.*, Article 14) which may thereafter be challenged.

<sup>10</sup> *Ibid.*, Article 5.



The special class, *Aufenthaltberechtigte*, is the source of substantial benefits for the long-term resident, who has established roots and economic ties in the Federal Republic. The *Ausländergesetz* 1965 permits this title of 'privileged resident' to be granted to aliens resident for at least five years who have adapted themselves economically and socially to local life. Those who qualify and who benefit from this status are not subject to area restrictions, to time limits or to other conditions, and the grounds upon which they may be expelled are substantially reduced.<sup>1</sup> The alien has no right to the grant of these privileges, but once his status has been recognized he cannot then be reduced to the residence permit class, although he continues to be liable to expulsion on the limited grounds.<sup>2</sup>

Both the French and German systems employ the *refus de séjour* as an intermediate stage between lawful residence and expulsion. The alien whose residence permit is refused or withdrawn comes under a duty to leave with due dispatch, although he is not at that time generally subject to police measures.<sup>3</sup> Expulsion itself is predicated upon more substantial grounds. French law is not very specific in the matter, but simply authorizes the expulsion of an alien whose presence 'constitue une menace pour l'ordre public ou le crédit public'.<sup>4</sup> German law on the other hand describes in some detail eleven grounds which may justify expulsion in such a way as to impose distinct and significant restrictions on the discretion of the authorities.<sup>5</sup> In France and in Germany the alien who is ordered to be expelled comes at once under a duty to leave. In practice, a reasonable time is allowed for departure and expulsion will be delayed pending the outcome of any appeal.<sup>6</sup> The departure itself is encouraged by the imposition of penalties for

<sup>1</sup> *AuslG*. Articles 8, 10 (1), 11 (1). Cf. *Expulsion of a Foreign National (Germany)* case, I.L.R., vol. 32, p. 255.

<sup>2</sup> The *AuslG*. simply declares that the alien 'kann' be granted privileged status: Article 8 (1). In certain circumstances the residence permit and the status of privileged resident terminate automatically, as where the alien ceases to hold a valid passport or where he loses or changes his nationality: *ibid.*, Article 9; Schiedermair, *op. cit.* (above, p. 114 n. 5), pp. 143-8.

<sup>3</sup> *AuslG*. Articles 2 (1) (1), 47 (1); Schiedermair, *op. cit.* (above, p. 114 n. 5), pp. 168-70; cf. *VerwRspr.* Bd. 23 S. 84 (Bayer. Obersten Landesgericht 1971). Compare ordonnance du 2 novembre 1945, article 19. French law and practice frequently refers to withdrawal and refusal of residence permits as measures of *refoulement*: Batiffol and Lagarde, *Droit international privé* (1970), pp. 190 et seq. The holders of ordinary and privileged permits must be dealt with in expulsion proceedings: décret du 30 juin 1946, articles 8, 9.

<sup>4</sup> Ordonnance du 2 novembre 1945, article 23. For the limits of judicial and administrative review, see below, pp. 122-4, and *ibid.*, articles 24-8. Expulsion may also be ordered by the *Préfets* of frontier and coastal *départements*.

<sup>5</sup> *AuslG*. Article 10 (1). A general provision is retained to order the expulsion of an alien when 'seine Anwesenheit erhebliche Belange der BRD aus anderen Gründen beeinträchtigt': *ibid.*, Article 10 (1), Nr. 11. Schiedermair has noted that expulsion under this essentially political provision cannot be effectively challenged on appeal, 'weil es sich insoweit um eine Regierungsakt und nicht um eine Verwaltungsakt handelt'; *op. cit.* (above, p. 114 n. 5), p. 163. See further below pp. 147-9, for examples of the further limits imposed by the courts on the discretion of the authorities. Cf. *VerwRspr.* Bd. 18 S. 737 (OVG, Hamburg, 1967); *VerwRspr.* Bd. 21 S. 353 (BVerwGE, 1970); *VerwRspr.* Bd. 21 S. 98 (OVG, Münster, 1969); *VerwRspr.* Bd. 21 S. 982 (VG, Baden-Württemberg, 1970); *BVerfGE*. Bd. 34 S. 211 (1973); *BVerfGE*. Bd. 35 S. 382 (1973).

<sup>6</sup> Ordonnance du 2 novembre 1945, articles 24, 25. It has been held that the provisions for appeal against expulsion in article 25 apply only to those aliens who show that they have entered

failure to leave<sup>1</sup> and, in the Federal Republic of Germany, by provisions which authorize the physical removal (*Abschiebung*) of the alien.<sup>2</sup> In France, the emphasis is on repeated prosecution for illegal residence, rather than forcible removal.<sup>3</sup> German law makes no specific provision in respect of destination, and the first choice is given to the alien.<sup>4</sup> It is generally accepted that the State of nationality is obliged to receive the alien,<sup>5</sup> although both France and Germany have concluded a number of bilateral treaties expressly to govern the return of those expelled.<sup>6</sup>

(iv) *Grounds for expulsion summarized.* The municipal law systems examined display a perhaps unremarkable consistency in their choice of grounds for expulsion. Generally, an alien will render himself liable to deportation if he qualifies under one or more of the following heads:

1. Entry in breach of immigration law.
2. Breach of the conditions of entry; for example, working without a work permit.
3. Becoming a 'public charge', to include illness and 'living off social security'.
4. Involvement in criminal activities.
5. Involvement in 'undesirable' political activities or otherwise offending against *ordre public*.

It is only rarely that local laws will make expulsion mandatory for the alien who comes within the above categories.<sup>7</sup> Executive authorities generally retain wide discretionary powers in regard to the final decision in such matters, and also in regard to the exercise of the residuary power to deport for political or security reasons.

(e) *Expulsion and respect for 'acquired rights'*

In the provisions of municipal law it is commonly accepted that, in exercising their discretion, State authorities must also take the interests of the individual into account, and weigh them in the balance with the competing demands of *ordre public*.<sup>8</sup> Thus, it will be relevant to consider, for example, length of residence

France lawfully and who hold residence permits: Conseil d'État, 2 février 1962, *Annuaire français de droit international*, 1963, p. 997. Cf. *VerwRspr.* Bd. 19 S. 481, 483; *AuslG.* Article 12 (1); Schiedermair, op. cit. (above, p. 114 n. 5), p. 169.

<sup>1</sup> Ordonnance du 2 novembre 1945, article 27; Cass. Crim., 20 janvier 1932, *Sirey* 1935, I, 33. *AuslG.* Articles 9 (1) (4), 47 (1) (2).

<sup>2</sup> *AuslG.* Article 13; note the limitations imposed by Article 14. *VerwRspr.* Bd. 23 S. 84.

<sup>3</sup> Cf. Batiffol and Lagarde, op. cit. (above, p. 115 n. 3), p. 157.

<sup>4</sup> It has been suggested that for the State to select a destination would be to involve the authorities in an interference within the reserved domain of other States: Schiedermair, op. cit. (above, p. 114 n. 5), p. 171. On the effect of expulsion, see *VerwRspr.* Bd. 18 S. 481 (OVG, Münster, 1967).

<sup>5</sup> Schiedermair, op. cit. (above, p. 114 n. 5), p. 178.

<sup>6</sup> In France, known as 'conventions de prise en charge de personnes à la frontière': Batiffol and Lagarde, op. cit. (above, p. 115 n. 3), p. 198; in the Federal Republic, as *Übernahme* or *Schubabkommen*; *AuslG.* Article 22; Schiedermair, op. cit. (above, p. 114 n. 5), pp. 178, 227 ff.

<sup>7</sup> The absolute exclusion of alien stowaways in United States law (8 U.S.C. s. 1182 (a) (18)) is exceptional.

<sup>8</sup> The jurisprudence of the Federal Republic of Germany refers expressly to '*die gebotene Abwägung zwischen dem öffentlichen Interesse und dem privaten Interesse des Ausländers an weiteren Aufenthalt in Inland*' (*BVerfGE.* Bd. 35 S. 382 (1973)).



in the State, the conduct and character of the individual, family and other connections, and compassionate circumstances.<sup>1</sup> In addition, the discretion must be exercised with due regard for acquired or vested rights. In its Judgment in *German Interests in Polish Upper Silesia* the Permanent Court of International Justice referred to provisions of the Geneva Convention 1922 which *confirmed* the obligation of the states involved<sup>2</sup>

to recognise and respect *rights of every kind* acquired before the transfer of sovereignty by private individuals, companies and juristic persons.

Later the Court emphasized that the principle of respect for acquired or vested rights was<sup>3</sup> 'a principle, which as the Court has already had occasion to observe, forms part of generally accepted international law'. Although in principle the property and contractual rights of individuals depend in every state upon municipal law,<sup>4</sup> this does not exclude conformity of the latter with the standards of international law, at least in so far as the rights of foreigners are concerned.<sup>5</sup>

(i) *The meaning of 'acquired rights'*. In the form in which it is usually proposed, the doctrine of respect for acquired rights is commonly limited to rights 'properly vested under municipal law . . . of an assessable value'.<sup>6</sup> Whether such a limitation is fully justified in view of the Permanent Court's reference to 'rights of every kind' is open to debate. However, if the restrictive interpretation is adopted, then its terms do not include the interests or 'legitimate expectations' of those who have established themselves within a State's territory solely by virtue of a period of substantial residence, whether or not accompanied by engagement in some profession. Thus, in *Jablonsky v. German Reich*<sup>7</sup> the Upper Silesian Arbitral Tribunal noted that

. . . as a rule the freedom to use one's working capacity and to exercise a profitable activity which rests on the general principle of industrial liberty does not constitute a subjective vested right. For such a right to exist there must be some title of acquisition and the recognition by the law of some concrete power.

Hence it may be argued that the 'right of residence' or the right to earn a living is not protected as such, and that international responsibility is not engaged until some injury to the person or property occurs. Recently the view has been

<sup>1</sup> Cf. United Kingdom, *Immigration Rules for Control after Entry (Commonwealth Citizens)*: 1973 H.C. No. 80, paras. 38-41; *ibid.* (*E.E.C. and other non-Commonwealth Nationals*): 1973 H.C. No. 82, paras. 45-8. See also *Hansard*, H.C. Deb., vol. 731, Written Answers, col. 45.

<sup>2</sup> *P.C.I.J.*, Series A, No. 7 (1926), p. 21, emphasis supplied.

<sup>3</sup> *Ibid.*, p. 42. See also *German Settlers in Poland*, *P.C.I.J.*, Series B, No. 6 (1923) at pp. 35, 36.

<sup>4</sup> See *Panevezys-Saldutiskis Railway case*, *P.C.I.J.*, Series A/B, No. 76 (1939), p. 18.

<sup>5</sup> Schwarzenberger, *International Law* (3rd ed., 1957), vol. 1, p. 204.

<sup>6</sup> O'Connell, *International Law* (2nd ed., 1970), p. 763. This description would, of course, cover most cases of 'confiscatory expulsion'.

<sup>7</sup> *Annual Digest*, 8 (1935-7), Case No. 42. Cf. Commonwealth Immigrants Act 1962, section 7 (2), and now the Immigration Act 1971, section 1 (2), (5) and especially section 7. See also *Niederstrasser v. Polish State*, *Annual Digest*, 6 (1931-2), Case No. 33 (licence to exercise a profession not as such protected by the Germano-Polish Convention 1922); *Hausen v. Polish State*, *Annual Digest*, 7 (1933-34), Case No. 40 (the obligation to respect rights of every kind did not extend to the alleged acquired right to continue employment as a teacher); case of *Lazar Rokach*, American-Turkish Claims Settlement, *Opinions and Report*, prepared by F. K. Nielsen (1937), pp. 503, 508; Amerasinghe, *State Responsibility for Injuries to Aliens* (1967), pp. 148 et seq.



advanced that States in East Africa do not accept the principle of a vested right of residence or rights to carry on a business or profession.<sup>1</sup> The fact that many Asians and others have been expelled from East Africa, even though long resident or born there, is called in aid in support of the view proposed. But such arguments do no more than beg the question. Of perhaps greater significance for the purposes of international law is the more general practice in East Africa of *gradually* implementing policies of 'Africanization', which is in keeping with the principle of respect for acquired rights. On the general issue, there is now a growing body of law which seeks to protect the individual in the enjoyment of rights which defy assessment in pecuniary terms. Thus it may be that the State in which the alien finds himself owes certain obligations to the international community as a whole, while other, more specific, obligations are owed to the protecting State. These latter obligations derive from the legal relationship between the two States which is constituted by the presence of the alien on the former's territory.

Expulsion is a measure primarily directed to the protection of the interests of the State. It is not essentially a measure for the punishment of aliens, although obviously its effects may be devastating.<sup>2</sup> The alien who is admitted for any substantial period of time, and especially one who is admitted for permanent residence, has many interests which require protection. He may establish himself in business, he may marry and have children. His interests will not all come within the limited doctrine of acquired rights, but over all he has what may be loosely called 'legitimate expectations'.<sup>3</sup> No significant distinction is to be drawn

<sup>1</sup> *Proceedings of the American Society of International Law*, 67 (1973), p. 122, at pp. 125-6 (Yash P. Ghai).

<sup>2</sup> In the view of the present writer, it is both undesirable and unnecessary to adopt the habit of certain municipal courts, which is to characterize deportation as 'not punishment', and from that characterization to deduce certain consequences, such as the absence of a right of appeal. See, for example, *Muller v. Superintendent, Presidency Jail, Calcutta*, I.L.R., 22 (1955), p. 497 (Supreme Court of India); *Bugajewitz v. Adams*, 228 U.S. 589 (1913), *per* Holmes J., at p. 591: '... nor is the deportation a punishment; it is simply a refusal by the government to harbour persons whom it does not want'. In *Lavoie v. INS*, 418 F. 2d 732 (1969) the court held that deportation proceedings were civil and not criminal; the Vth Amendment guarantees declared and affirmed in *Miranda v. Arizona*, 384 U.S. 436 (1966) did not, therefore, apply; but cf. *Woodby v. INS*, 385 U.S. 276 (1966), at p. 285; *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963), at p. 479. More recently, in *Santelises v. INS*, 491 F. 2d 1254 (1974), the civil nature of the proceedings was held to mean that deportation could not amount to 'cruel and unusual punishment' contrary to the VIIIth and XIVth Amendments; compare the view of the Supreme Court on capital punishment (*Furman v. Georgia*, 92 S. Ct. 2726 (1972), especially *per* Brennan J. at pp. 2742-8), and on expatriation (*Trop v. Dulles*, 356 U.S. 86 (1958), at p. 102). With reference to the law of the Federal Republic of Germany, Schiedermaier has observed: 'die Ausweisung ist im übrigen eine Verwaltungsmassnahme und keine Strafe...' and therefore the principle *ne bis in idem* does not apply where expulsion is ordered after conviction and punishment: *op. cit.* (above, p. 114 n. 5), p. 154. A similar conclusion was reached in *U.S. v. Ramirez-Aguilar*, 455 F. 2d 486 (1972).

<sup>3</sup> See *Schmidt v. Secretary of State*, [1969] 2 Ch. 149, particularly the judgment of Lord Denning M.R. at pp. 170-1, and his discussion of *Re H.K. (an infant)*, [1967] 2 Q.B. 617 and *R. v. Secretary of State, ex parte Avtar Singh* (Divisional Court, 25 July 1967, unreported). In *Birdi v. Secretary of State* (Court of Appeal, 11 February 1975, reported in *The Law Society's Gazette*, 5 March 1975, p. 26), Lord Denning suggested that the notion of 'legitimate expectations' would apply in favour of any illegal entrant who arrived in the United Kingdom before 1 January 1973 and who thus came within the terms of the amnesty announced by the Home Secretary on 11 April 1974.

between the refusal to renew permission to remain and the premature withdrawal of such permission.<sup>1</sup> In many cases of established residence the alien who is refused permission to remain will be as badly off as one whose permission is suddenly withdrawn, and in both cases there exists the possibility of an infringement of personal and property rights. A straightforward classification of the alien's continued residence as involving nothing greater than a 'privilege' solves nothing. It certainly does not meet the argument that discretion in the granting of privileges is, and requires to be, confined by rules of law.<sup>2</sup>

The wider doctrine of 'legitimate expectations' received a certain amount of recognition in the diplomatic exchanges of the past,<sup>3</sup> but of greater relevance today is the approach adopted in municipal law. In the United States, most attempts to broaden out the protections of due process have failed on account of the non-criminal character of deportation. Increased awareness that the consequences of deportation may be far more devastating than imprisonment has not significantly affected actual decisions; however, it is clearly a factor to be considered in the course of the exercise of discretion.

(ii) *A vested right of residence?* Before the courts of the United States it has been argued that the resident alien, of all people, will frequently have established strong family ties and acquired property interests, and that these and other relevant considerations together amount to a 'vested right of residence' worthy of greater protection than is provided by mere procedural guarantees.<sup>4</sup> In *Harisiades'* case, however, the Supreme Court observed that by withholding his allegiance from the United States the alien leaves outstanding a foreign call on his loyalties:<sup>5</sup>

So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure. That aliens remain vulnerable to expulsion after long residence is a practice bristling with severities. But it is a weapon of defence and reprisal confirmed by international law as a power inherent in every State.

<sup>1</sup> Cf. Immigration Act 1971, section 14; *Report of the Wilson Committee on Immigration Appeals*, Cmnd. 3387, paras. 128-30; Leacock, 'Prohibited Immigrants and Illegal Entrants under Barbados and United Kingdom Immigration Laws', *International and Comparative Law Quarterly*, 23 (1974), p. 160.

<sup>2</sup> See Davis, *Discretionary Justice*, pp. 130, 172-6, on the analogous problems in the United States procedure on parole—'only a privilege'.

<sup>3</sup> *Haiti* (1890); *Withdrawal of Trading Licences: British Digest of International Law*, vol. 6, pp. 346-7. See also *ibid.*, pp. 154-5, in respect of a similar incident in 1911-12; *Dr. Gamble's* case 1852, *ibid.*, p. 347, in which the Queen's Advocate advised that a claim for compensation might be pressed for the sudden order by the Mexican authorities, unaccompanied by reasons, that the complainant suspend his medical practice. More recently, note remarks by the Secretary of State on the refusal of re-entry by the Cyprus Government to an alien resident for over 40 years: *Hansard*, H.C. Deb., vol. 706, cols. 184-5, cited in *British Practice in International Law*, 1965-I, pp. 46-7. See above, p. 111, for recognition of the rights of those settled or ordinarily resident in the United Kingdom by the Immigration Act 1971.

<sup>4</sup> *Mignozzi v. Day*, 51 F. 2d 1019 (1931), *per* Learned Hand J. at p. 1021: 'To root up all those associations which we call home, to banish him to be an outcast in a country of whose traditions and habits he knows nothing and where his alienage is a daily living fact, not a legal imputation—these are consequences whose warrant we may properly scrutinize with some jealousy and insist that logic shall not take the place of understanding.' Cf. *R. v. Friedmann*, (1914) 10 Cr. App. Rep. 72.

<sup>5</sup> 342 U.S. 580. And note *Shaughnessy v. Mezei*, 345 U.S. 206 (1953). Cf. *Nottebohm* case, *I.C.J. Reports*, 1955, p. 4, *per* Judge Read, dissenting, at p. 47.



The language may be a little archaic, but the sentiments persist and the concept of a vested right of residence remains unaccepted by the courts of the United States; whatever right the alien may have, it is not generally such as may be opposed to the paramount power of Congress to determine whether he shall be permitted to remain.

In several other cases, however, it has been held that a *resident* alien who departs from and then returns to the United States is not thereby liable to be *excluded*, and that he is entitled to be dealt with only in deportation proceedings.<sup>1</sup> In *Stacher v. Rosenberg* in 1963,<sup>2</sup> the District Court of California held that a resident alien could not be removed in exclusion proceedings where he had planned his whole trip and his return while domiciled and personally present in the United States. In addition, the court observed that there was in fact no other country to which the alien, a resident for over fifty years, could be deported.<sup>3</sup> Noting that the alien's 'undesirability' arose from conduct since admission, the court stated that his was the typical case for which the expulsion procedure was designed and intended.<sup>4</sup> This approach was affirmed by the Supreme Court in *Rosenberg v. Fleuti* in the same year.<sup>5</sup> In the Court's view, the statutory provision that an alien having a lawful permanent residence in the United States should not be regarded as making an 'entry' into the United States if his departure to foreign parts was not intended or reasonably to be expected by him,<sup>6</sup> should be so interpreted as to protect resident aliens only briefly absent. An alien does not make an entry, and does not thereby become liable to be excluded, unless he intended to depart in a manner which can be regarded as 'meaningfully interruptive' of his permanent residence.<sup>7</sup> So far, these decisions mark the limit to the substantive protection which the courts are prepared to allow. There has been but little advance since *Harisiades*, and although the alien resident will not now be arbitrarily excluded, he gains no special privilege of exemption from the deportation law.<sup>8</sup>

Both French and German law also recognize that the long-resident alien occupies a position different from that of one who has just arrived or who is still on the point of initial entry.<sup>9</sup> His special status warrants special protection, and there is an increasing readiness on the part of States to restrict expulsion to

<sup>1</sup> *Chew v. Colding*, 344 U.S. 590 (1953).

<sup>2</sup> 216 F. Supp. 511 (1963).

<sup>3</sup> *Ibid.*, pp. 513, 514.

<sup>4</sup> 216 F. Supp. 511, 513, 514.

<sup>5</sup> 374 U.S. 449 (1963).

<sup>6</sup> Immigration and Nationality Act 1952, section 101 (a) (13); 8 U.S.C. s. 1101 (a) (13). In *Palatian v. INS*, 502 F. 2d 1091 (1974), a majority of the court held that there was a 'meaningful interruption of permanent residence' where the alien went to Mexico and returned after two and a half days with 55 pounds of untaxed marijuana. He could, therefore, be dealt with in exclusion proceedings.

<sup>7</sup> *Di Pasquale v. Karnuth*, 158 F. 2d 878, 879 (1949), *per* Learned Hand J.: (alien had taken overnight sleeper from Buffalo to Detroit on route passing through Canada), '... it is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality, once granted, should not be subject to meaningless and irrational hazards.' The judge referred also to the alien's 'vested right of residence'.

<sup>8</sup> *Rodriguez-Romero v. INS*, 434 F. 2d 1002 (1970). This protection may nevertheless be fairly substantial, for the grounds of exclusion are far wider than those for deportation.

<sup>9</sup> See the category of *résidents privilégiés*, above, pp. 113-14, in French law; and also the category of *Aufenthaltsberechtigter* in the law of the Federal Republic of Germany, above, pp. 114-15.



grounds of the most serious nature. Any alien who is deported suffers a punishment distinctive by reason of his alienage, and the longer he has been resident in the host country, the greater will be the hardship. At the present time it cannot be said that there is a rule of general international law which forbids the expulsion of resident aliens, but there is a generality of practice sufficient to indicate the special position of this class. This is balanced by recognition of the fact that the receiving State is entitled to expect more from the resident alien than from the transient alien. Thus, it is the former who may on occasion be called upon to perform military service,<sup>1</sup> and who is required to submit to the jurisdiction and to seek his remedies in the local courts.<sup>2</sup> In return, State practice as evidenced by the content of the municipal systems examined suggests a restriction on the permissible grounds for expulsion, together with a requirement for a more thoroughgoing examination of the individual's interests and expectations.

(f) *Conclusions relating to the justification for expulsion*

1. Justification for expulsion is demanded by reason of the function and purpose of the power, and the requirement of good faith.

2. State practice accepts that expulsion is justified:

- (a) for entry in breach of law;
- (b) for breach of the conditions of admission;
- (c) for involvement in criminal activities;
- (d) in the light of political and security considerations.

3. In determining whether its interests are adversely affected by the continuing presence of the alien, or whether there is a threat to *ordre public*, the expelling State enjoys under international law a fairly wide margin of appreciation.

4. *Ordre public* remains a 'general legal conception', the content of which is determined by law. Whether or not reasons of *ordre public* exist is open to impartial adjudication in the light of the prescribed function of expulsion and of the international obligations which each State owes.

<sup>1</sup> See Opinion of the King's Advocate 1824, on the question of the liability of British subjects to military service in the Netherlands: *British Digest of International Law*, vol. 6, pp. 248-9. In the United States aliens admitted for permanent residence must register for selective service within six months after admission and they are liable to be drafted after one year's residence: section 5 (a) (3), Military Selective Service Act, as amended, 50 U.S.C. App. 455 (a) (3); 32 C.F.R. 1611. 5. In the past non-immigrants were also liable to be drafted if they remained in the U.S. beyond one year. Relief could be obtained, particularly under the provisions of bilateral treaties, but this resulted in disqualification from naturalization and other immigration benefits. Under present law as amended in 1971 (85 Stat. 348; 50 U.S.C. App. 451 (a)), an alien admitted as a non-immigrant is not required to register for military service and is not subject to induction while he maintains his lawful non-immigrant status.

<sup>2</sup> See *Mr. Crutchett's case* 1864: *British Digest of International Law*, vol. 6, pp. 252-3. Note also the influence here of the so-called 'link factor': *Aerial Incident* 1955 (Israel v. Bulgaria), *I.C.J. Pleadings*, 1959, pp. 530-1. It may also be necessary to consider the case where the long-resident alien may have acquired the 'effective nationality' of the host State; see Brownlie, *Principles of Public International Law* (2nd ed., 1973), p. 506; *Nottebohm case*, *I.C.J. Reports*, 1955, p. 4 at p. 23.

5. The principle of good faith and the requirement of justification, or 'reasonable cause', demand that due consideration be given to the interests of the individual, including his basic human rights, his family, property and other connections with the State of residence, and his legitimate expectations. These must be weighed against the competing claims of *ordre public*.

### 3. THE MANNER AND FORM OF EXPULSION

An expulsion which is founded on just cause may nevertheless be tainted by the manner in which it is carried out. Oppenheim notes that as deportation is not, theoretically, a punishment, it must be effected with as much forbearance as the circumstances and conditions allow.<sup>1</sup> The expulsion must, in the first instance, be permitted by the local law, and, further, be effected only in pursuance of a decision reached in accordance with law.<sup>2</sup> This latter requirement precludes arbitrariness and is derived directly from the standards of general international law.

#### (a) *The right to a hearing*

Less settled is the question whether a hearing must be permitted to the alien. This point was taken by the Arbitrator in the *Chevreau* affair, which arose out of the expulsion and alleged ill treatment of a Frenchman by the British military authorities in Persia.<sup>3</sup> The Arbitrator concluded that Chevreau's arrest might have been justified, but he noted that the British authorities were thereafter under a duty to proceed to a full inquiry without delay. M. Chevreau ought to have been informed of the suspicions against him and to have been given an opportunity to state his own case.<sup>4</sup> The French Government in fact claimed no express indemnity for the deportation itself, apart from the general claim in respect of arrest, detention, ill treatment, and loss of property.<sup>5</sup> By their *compromis*, the parties had requested the arbitrator to decide whether the arrest, detention and deportation had taken place in circumstances which gave rise to a claim in international law.<sup>6</sup> Both parties also accepted that the rules to be applied were those previously laid down by the various international commissions, and that, whereas the facts alleged might give rise to an international claim, such claim was ill founded if the measures had been taken in good faith and on reasonable suspicion, particularly in a zone of military operations.

The right to a hearing was given a limited recognition in the code adopted by

<sup>1</sup> *International Law* (8th ed., 1955), vol. 1, p. 694.

<sup>2</sup> See the cases of *Jaurett* and *Scandella*, both involving summary expulsion from Venezuela in breach of the local law. In the first case, that law permitted only the expulsion of those foreigners who had not established their domicile, and in the latter case the alien was denied the hearing to which he was entitled. Both claims were settled by agreement: Whiteman, *Damages in International Law*, vol. 1, pp. 432-6; Hackworth, *Digest*, vol. 3, p. 696.

<sup>3</sup> France-Great Britain, *compromis* of 4 March 1930, *United Nations Reports of International Arbitral Awards*, vol. 2, p. 1113.

<sup>4</sup> *Ibid.*, at p. 1125.

<sup>5</sup> *Ibid.*, p. 1129. A total sum of £2,100 was allowed, representing £2,000 for the arrest and detention and £100 for the loss of a violin. The evidence of ill treatment was held insufficient to found a claim in international law.

<sup>6</sup> Article II of the *compromis*, *ibid.*, p. 1115.

the Institute of International Law in 1892.<sup>1</sup> Article 21 of the code declared that every individual expelled had the right to have recourse to a court or administrative tribunal passing judgment completely independent of the Government. Such a hearing was to be granted in all cases where the individual claimed to be a national or maintained that his expulsion was contrary to law or treaty. Where political issues were involved, however, it was conceded that the expulsion might take place before any appeal was heard. Many States do, in practice, permit some form of review of, if not appeal against, expulsion orders, but it has not been found easy to apply the concept of denial of justice in this area. Arbitrators and others have never satisfactorily resolved the dichotomy between due process and what they have characterized as 'sovereign powers'. In *Ben Tillett's* case, for example, the arbitrator concluded that Belgium was not liable for the summary expulsion of a political agitator without accusation or criminal charge.<sup>2</sup> The Government, in evaluating the facts and ordering the expulsion, had acted 'in the plenitude of its sovereignty', and the case then turned solely on the question of whether there had been any ill treatment.

A more recent attempt to introduce the requirement of a hearing is to be found in Article 13 of the Covenant on Civil and Political Rights. This declares that, except where compelling reasons of national security otherwise require, the alien shall be allowed to submit reasons against his expulsion and to have his case reviewed by the competent authority. Although many States do make provision for some sort of a hearing, it is doubtful whether Article 13 can be regarded as expressing a rule of *lex lata*. Thus, the requirement is commonly subject to wide exceptions and there are few restrictions on the quality or character of the 'competent authority'.<sup>3</sup>

### (b) *Judicial review*

A useful distinction may be maintained, however, between the notion of a hearing and appeal on the one hand, and the availability of judicial review on the other. Not infrequently States will reserve to the executive branch the power of appreciating the facts and reasons behind an expulsion, while they will permit the judicial branch to review the legality of their actions. For example, under French law, expulsion may be ordered where the presence of the alien represents 'une menace pour l'ordre public ou le crédit public'.<sup>4</sup> Certain guarantees are declared in favour of lawful residents and provision is made for a right to be heard, except in cases of absolute emergency so certified by the Minister.<sup>5</sup> The judicial tribunals are not entitled to question the occasion for an expulsion order or the reasons which lie behind it.<sup>6</sup> Moreover, the administrative tribunals are

<sup>1</sup> *Annuaire de l'Institut de droit international*, XII (1892-4), pp. 218, 222.

<sup>2</sup> *British Digest of International Law*, vol. 6, pp. 124-50.

<sup>3</sup> Note the rejection by the Committee of Experts of the proposals to include similar, but more detailed, rights for aliens in the Fourth Protocol of the European Convention on Human Rights, below, pp. 141-2.

<sup>4</sup> Ordonnance du 2 novembre 1945, article 23.

<sup>5</sup> *Ibid.*, articles 24, 25 and 26.

<sup>6</sup> Cour de Cassation (Ch. crim.), arrêt du 17 décembre 1937, (*Keledjian*), *Clunet*, 1938, p. 485; arrêt du 20 décembre 1966 (*Yahia Ali*), *Revue critique de droit international privé*, 1967, p. 517, note Aymond; *Dalloz*, 1967, p. 19.



not permitted to review the appreciation of fact upon which is based either the conclusion that the alien is a danger to *ordre public*, or that the occasion is one of urgency.<sup>1</sup> But they may decide on the *legality* of the order of expulsion,<sup>2</sup> and this involves consideration of the question whether there has been an 'excès ou détournement de pouvoir'.<sup>3</sup>

(c) *Rights of appeal in municipal law*

It is not uncommon to find that the review of legality is supplemented by local provision for a full hearing on the merits.

(i) *United States practice*. In the United States, for example, the decision to commence deportation proceedings is within the discretion of the Attorney-General, but this is not uncontrolled and a decision may be subject to judicial review if it is motivated by some unconstitutional reason, such as race, religion, colour or other arbitrary classification.<sup>4</sup> In practice, deportation proceedings will be commenced with the issue and service of an order to show cause why the alien should not be deported, and the alien will only normally be arrested where this is in the public interest or if he is likely to abscond.<sup>5</sup> The order to show cause must state the grounds upon which the *prima facie* case of deportability is based, in such a way as to enable the alien to meet the allegations against him. Although attempts to introduce the full requirements of judicial process have generally failed, the statute itself does provide for the minimum rights essential to a fair hearing.<sup>6</sup> This hearing takes place before an immigration judge,<sup>7</sup> who is empowered to determine deportability, to make orders of deportation, to permit voluntary departure, to determine the country to which the alien is to be removed, to pass on applications to withhold deportation on the ground of anticipated persecution,<sup>8</sup> to determine the validity of visas, etc., and to take any other appropriate and consistent action.<sup>9</sup> The immigration judge is authorized to conduct the whole hearing, and to this end may administer oaths, present and receive evidence, interrogate, examine and cross-examine witnesses.<sup>10</sup>

<sup>1</sup> Conseil d'État, arrêt du 24 octobre 1952 (*Eckert*), *Clunet*, 1953, p. 67; *Yahia Ali*, loc. cit. (previous note). This approach resembles that adopted by United States courts in certain cases, and which is known as the 'political question doctrine'; see Konvitz, *Civil Rights in Immigration* (1953), p. 44; *Baker v. Carr*, 369 U.S. 186 (1962), at p. 217. Cf. the view taken by courts in Scotland of certain provisions of the Act of Union 1707 and to the effect that any obligations which that Act may impose upon the Westminster Parliament are not justiciable: *MacCormick v. Lord Advocate*, 1953 S.C. 396; *Gibson v. Lord Advocate*, 1975 S.L.T. 134.

<sup>2</sup> Conseil d'État, arrêt du 4 février 1955 (*Molinelli-Wells*), *Revue pratique de droit administratif* (1955), p. 85.

<sup>3</sup> Cf. Batiffol and Lagarde, *Droit international privé* (1970), pp. 194 et seq.

<sup>4</sup> *U.S. v. Sacco*, 428 F. 2d 264, 271 (1970); note also the difference between exclusion and deportation proceedings, and the inapplicability of the *Miranda* rules; see above, p. 104.

<sup>5</sup> 8 U.S.C. s. 1252 (a).

<sup>6</sup> *Ibid.*, s. 1252 (b).

<sup>7</sup> Formerly known as a 'special inquiry officer'; the new designation was introduced in 1973: 8 C.F.R. 1. 1 (1), as amended by 38 F.R. 8590.

<sup>8</sup> See below, p. 126 n. 2.

<sup>9</sup> 8 C.F.R. 242. 8 (a). Certain matters are reserved to the District Director, such as waiver of inadmissibility and the question of refugee status.

<sup>10</sup> No immigration judge may conduct a hearing in any case in which he has previously acted in an investigating or prosecuting capacity: 8 U.S.C. s. 1252 (b).

The statute expressly provides that the alien shall be given reasonable notice of the case and of the time and place of the hearing; that he may be represented by counsel at his own expense; that he shall have a reasonable opportunity to examine the evidence against him, to present his own evidence and to cross-examine Government witnesses.<sup>1</sup> It is further expressly provided that no decision of deportability shall be valid unless 'based upon reasonable, substantial and probative evidence'.<sup>2</sup> Furthermore, the burden of proof is on the government in most cases, although it is incumbent on the alien to show the time, manner and place of his entry into the United States.<sup>3</sup>

If the alien admits that he is liable to deportation, then in certain circumstances he may be allowed the privilege of voluntary departure.<sup>4</sup> In all other cases the immigration judge is required to prepare a full and reasoned decision which is based on the evidence received. This decision may then be made the subject of an administrative appeal to the Board of Immigration Appeals,<sup>5</sup> either at the instance of the alien or of the Commissioner of the Immigration Service. The Board is entitled to exercise any of the Attorney-General's powers in the course of its review of the decision of the immigration judge. It is expected to use its own judgment and is not subject in the exercise of discretion to any limitations or standards set by the Attorney-General.<sup>6</sup> After review by the Board, a decision remains open to challenge in the courts on the ground that it is illegal or arbitrary or that it involved a denial of due process.<sup>7</sup>

**Destination:** Where it is decided that the alien shall be deported, it is then necessary for the immigration judge to specify the State to which he is to be

<sup>1</sup> This rules out the possibility of the government's relying upon confidential evidence. It is otherwise in exclusion cases and in applications for discretionary relief: *Jay v. Boyd*, 351 U.S. 345 (1956); 8 C.F.R. 242. 17 (a).

<sup>2</sup> 8 U.S.C. s. 1252 (b). This significant guarantee was developed by the courts from a requirement of 'sufficient' evidence (*Goncalves-Rosa v. Shaughnessy*, 151 F. Supp. 900 (1957)), to one of 'substantial' evidence (*Liacakos v. Kennedy*, 195 F. Supp. 630 (1961)), and finally to a Supreme Court ruling that no order for the deportation of a resident alien may be made unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true (*Woodby v. INS*, 385 U.S. 276 (1966)). In this case the Court observed (at p. 285): 'To be sure, a deportation proceeding is not a criminal prosecution. . . . But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case.' Cf. *Lim v. Mitchell*, 431 F. 2d 197 (1971); and see 8 U.S.C. s. 1105a (a) (4); 8 C.F.R. 242. 14 (a).

<sup>3</sup> 8 U.S.C. s. 1361, which also provides that the alien may rely upon, and request the production of, visas, etc. Where the government's case is based upon the alien having become a public charge under s. 1251 (a) (3) or (8), it is for the alien to show otherwise.

<sup>4</sup> 8 U.S.C. s. 1251 (b); s. 1254 (e). The discretion to permit voluntary departure applies in all cases other than those where there is reason to believe that the alien is deportable under s. 1251 (a) (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), (18), i.e. generally, as a subversive, criminal, prostitute, drugs offender or one involved in violation of the aliens registration requirements. The Attorney-General may authorize the payment of removal expenses if this is in the best interests of the country.

<sup>5</sup> 8 C.F.R. 242. 21. The immigration judge may reopen the hearing at any time before the Board of Immigration Appeals secures jurisdiction over the appeal.

<sup>6</sup> *Jarecha v. INS*, 417 F. 2d 220 (1969).

<sup>7</sup> The only remedy available is that of habeas corpus, and all prior administrative remedies must be first exhausted: 8 U.S.C. s. 1105 (a) (9), (c). Cf. *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103 (1927); *R. v. Peterkin, ex parte Soni*, [1972] Imm. A.R. 253 (Divisional Court).



removed. The alien is given first choice, and removal may be ordered to the State designated by him if that State is willing to admit him and unless the Attorney-General considers that this would be prejudicial to the interests of the United States. If the first choice fails, it is for the immigration judge to order deportation to any State or country of which the alien is a national or citizen. If that country in turn is unwilling to receive him, then there is a discretionary power to seek removal to any one of seven different destinations, including the State from which the alien entered the U.S.A., the State in which he was born and, finally, any country which is willing to receive him.<sup>1</sup> It remains within the discretion of the Attorney-General whether or not to suspend deportation and to adjust the status of the alien to that of a permanent resident.<sup>2</sup> This power may be exercised in favour of those resident in the United States for at least seven years,<sup>3</sup> who are of good moral character, and whose deportation would result in extreme hardship to the spouse, parent or child of a United States citizen or alien resident. In each case it is for the applicant to show that he is eligible for discretionary relief and, moreover, that the discretion should be exercised in his favour.<sup>4</sup>

(ii) *United Kingdom practice.* In the United Kingdom appellate bodies were established by the Immigration Appeals Act 1969 after recommendations by the Wilson Committee.<sup>5</sup> They are continued by the Immigration Act 1971 and are empowered to review the decisions of the Secretary of State or any immigration officer. In most cases appeal lies in the first instance to an adjudicator, and Section 19 of the Act provides that he shall allow the appeal if he considers (1) that the decision or action in question was not in accordance with the law or with any immigration rules applicable to the case; or (2) where the decision or action involved the exercise of a discretion by the Secretary of State or any officer, that the discretion should have been exercised differently.<sup>6</sup> In the exercise of his functions, the adjudicator may review any determination of a question of fact upon which the decision was based, but it is expressly provided that, where the decision or action is otherwise in accordance with the Immigration Rules, a refusal to depart from those rules shall not be construed as an exercise of discretion.<sup>7</sup> In one case it was held that this latter restriction

<sup>1</sup> 8 U.S.C. s. 1253 (a). See *Staniszewski v. Watkins*, 80 F. Supp. 132 (1948); *Hudak v. Uhl*, 20 F. Supp. 928 (1937); also *Chan v. McFarlane*, 34 D.L.R. (2d) 179 (1962).

<sup>2</sup> 8 U.S.C. s. 1254 (a); 8 C.F.R. 242. 17 (a). On 'anticipated persecution' as a ground for appeal against deportation, see 8 U.S.C. s. 1254 (h), as amended in 1965 (79 Stat. 911, s. 11 (f)). For the provision in action, see *Fu v. INS*, 386 F. 2d 750 (1967); *Mercer v. Esperdy*, 234 F. Supp. 611 (1964); *Blazina v. Bouchard*, 286 F. 2d 510 (1961); *Glavic v. Beechie*, 225 F. Supp. 24 (1963); *Kovac v. INS*, 407 F. 2d 102 (1969); cf. *Berdo v. INS*, 432 F. 2d 824 (1970); *Chim Ming v. Marks*, 505 F. 2d 1170 (1974); see also Evans, 'The Political Refugee in United States Immigration Law and Practice', *The International Lawyer*, 3 (1969), p. 204.

<sup>3</sup> 'Ten years' residence and 'extremely unusual hardship' are required if discretionary relief is to be granted to those liable to deportation as subversives, criminals, prostitutes, drug offenders, or for having been involved in violation of the aliens registration laws.

<sup>4</sup> 8 C.F.R. 242. 17 (d).

<sup>5</sup> *Report of the Wilson Committee on Immigration Appeals*, Cmnd. 3387.

<sup>6</sup> Immigration Act 1971, section 19 (1) (a); in any other case he is to dismiss the appeal: section 19 (1) (b).

<sup>7</sup> Section 18 (2).



prohibited the adjudicator from allowing an appeal on considerations of natural justice.<sup>1</sup>

To urge that for reasons of natural justice these rules should not be applied . . . can really only mean that the Secretary of State is being requested . . . to depart from the rules. This he has refused to do and since his decision is in accordance with the Immigration Rules, such decision cannot be treated as having involved the exercise of a discretion.

In certain cases, such as those involving the 'public good',<sup>2</sup> appeal lies directly to the Immigration Appeals Tribunal. This is also the procedure where a deportation order is made against the wife or children under eighteen of any person who is himself ordered to be deported.<sup>3</sup> Before any such 'family order' is made, the Secretary of State will consider, for example, how long the family has been resident, what ties they have in the United Kingdom other than with the deportee, and whether the wife can maintain herself and her children in the foreseeable future without relying on public funds. These provisions are directed solely at the wife, and it appears that the Immigration Rules, unlike the statute itself, do not envisage the woman either as breadwinner and head of the family, or as principally liable to be deported.<sup>4</sup> In the past, other discriminatory provisions operated against women. Thus, if a woman who was settled in the United Kingdom happened to marry a non-patrial, she had no right to have her husband settle with her. This rule applied even in the case of a woman who was a citizen of the United Kingdom and who herself had the right of abode. Both this practice and the rule by which wives were denied the separate use of family passports were justified by the Government on the ground that they conformed with international usage,<sup>5</sup> and that the prohibition on husbands and fiancés operated as an acceptable and useful barrier against people 'marrying their way through the controls'.<sup>6</sup> The rules were amended in 1974, and a woman settled in the United Kingdom is now entitled to have her husband or fiancé join her.<sup>7</sup> Certain other concessions are also made to the independent status of women.

<sup>1</sup> *Secretary of State v. Glean*, [1972] Imm. A.R. 84, 88.

<sup>2</sup> See above, pp. 112-13.

<sup>3</sup> Immigration Act 1971, section 15 (7) (b), (c). Any member of such family may depart voluntarily if he does not wish to appeal or if his appeal is dismissed: *Statement of Immigration Rules for Control after Entry (Commonwealth Citizens)*, 1973 H.C. No. 80, paras. 44-8; *Statement of Immigration Rules for Control after Entry (E.E.C. and other Non-Commonwealth Nationals)*, 1973 H.C. No. 82, paras. 51-5.

<sup>4</sup> Cf. Immigration Act 1971, section 5 (4).

<sup>5</sup> On international passport practice, see *Hansard*, H.C. Deb., vol. 814, cols. 227-8; H.C. Deb., vol. 817, col. 871 (1971); H.C. Deb., vol. 829, cols. 967-8; H.C. Deb., vol. 838, cols. 978-80 (1972); for the change in United Kingdom practice, see statement by Lord Balniel, H.C. Deb., vol. 860, col. 1595 (1973). On the alleged international practice that the family should follow the head of the household (male), see H.C. Deb., vol. 846, cols. 37, 40-1 (1972); H.C. Deb., vol. 849, col. 663 (1973). See also *Secretary of State v. Dumont*, [1972] Imm. A.R. 119; cf. Spouses (Equal Treatment) Bill 1974, presented to the House of Lords by Lord Avebury.

<sup>6</sup> H.C. Deb., vol. 851, col. 640 (1973).

<sup>7</sup> 1973 H.C. No. 79, new paras. 47, 48, 49 substituted by Cmnd. 5715 (1974); 1973 H.C. No. 81, new paras. 42, 43, 44 substituted by Cmnd. 5717 (1974); these new rules came into force on 27 June 1974. The husband or fiancé does not have an *absolute* right to settle: *Vasiljevic v. Secretary of State*, [1975] Imm. A.R. 100.

Thus, it is provided that a wife is not to be regarded as part of the family if she is living apart from her husband, and her deportation will not normally be considered if she has herself qualified for settlement in the United Kingdom. Children approaching the age of eighteen, if they have spent some years in the United Kingdom, or if they have left the family and established themselves, are also not normally to be deported.<sup>1</sup>

This attitude to the family may be briefly compared with that current in the courts of the Federal Republic of Germany. There it has been held, for example, that, by virtue of Article 6 (1) of the *Grundgesetz*, a German spouse has such an interest in the proposed deportation of husband or wife that he or she is entitled to be a party to the proceedings.<sup>2</sup> Other cases have consistently affirmed that marriage and the family are institutions demanding the most positive protection of the courts,<sup>3</sup> and the presumption thus raised operates as a most significant limitation upon the discretion of the authorities.

In the United Kingdom, on the other hand, a number of rules operate effectively to bar the review of discretionary powers. For example, it is provided that an extension of stay 'may be granted' to a Commonwealth trainee if the Department of Employment submit a favourable report to the Home Office.<sup>4</sup> It has been held that the discretion only comes into play where a favourable report is received, and that without such report the Home Office do not enjoy any choice between alternative courses of action.<sup>5</sup> In another case, the Tribunal ruled that the applicant who seeks an extension of stay must bring himself within one or other of the categories set out in the Immigration Rules. For example, he must qualify as a person of independent means or as a person setting up in business on his own account. It is not permissible to pick certain factors from one category and to add them to certain factors from another category, so as to arrive at some composite type of immigrant. The categories are bound by the rules, and exceptions must be a matter for special decision by the Secretary of State. They are not, therefore, subject to review as an exercise of discretion.<sup>6</sup>

<sup>1</sup> 1973 H.C. No. 81, paras. 44-8; 1973 H.C. No. 82, paras. 51-5.

<sup>2</sup> *VerwRspr.* Bd. 25 S. 337 (BVerwG. 1973).

<sup>3</sup> See *VerwRspr.* Bd. 25 S. 81 (Hesse, VGH); *ibid.*, S. 333 (BVerwG, 1973); *BVerfGE.* Bd. 37 S. 217, 247 (1974). Compare practice in other jurisdictions; in the United Kingdom it has been held additionally that an alien may not generally object to expulsion on the ground that he or she is married to a national: *C. v. E.*, [1946] T.L.R. 326; *R. v. Hannah Fine*, (1912) 29 T.L.R. 61 (C.C.A.); Aliens Order 1953, article 20 (5); see now Immigration Act 1971, section 5 (2). See also Conseil d'Etat, 8 mars 1939, *Nouvelle Revue de droit international privé*, 1939, p. 456. In Canada it has been held that an alien woman may not resist expulsion on the ground that she is the mother of a child who is a citizen by birth: *Louie Yuet Sun v. The Queen*, I.L.R., vol. 32, p. 252; and a similar conclusion was reached in the United States: *Aalund v. Marshall*, 461 F. 2d 710 (1972).

<sup>4</sup> 1973 H.C. No. 80, paras. 15-16; see also 1973 H.C. No. 82, para. 14 (student employees who are foreign nationals). There is no appeal against the decisions of the Department of Employment: *Latiff v. Secretary of State*, [1972] Imm. A.R. 76. Compare United States law, above, p. 104 n. 4.

<sup>5</sup> *Ainooson v. Secretary of State*, [1973] Imm. A.R. 43; this decision turned on the substantially similar provision of earlier rules: Cmnd. 4295, para. 18. See also *Brizmohun*, [1972] Imm. A.R. 122; *Islam*, [1975] Imm. A.R. 106.

<sup>6</sup> *Secretary of State v. Martin*, [1972] Imm. A.R. 1461; [1972] Imm. A.R. 275 (Q.B.D.).

The issue of discretion will be of particular importance where deportation is ordered on the grounds of public good, otherwise than in security and political cases. The Tribunal will then be required to weigh the interests of *ordre public* against those of the individual,<sup>1</sup> and an indication of the correct approach was given by the Divisional Court in *R. v. Peterkin (Adjudicator), ex parte Soni*.<sup>2</sup> On an appeal against the refusal of an entry certificate, the adjudicator had taken the view that he should not interfere with the decision unless it could be shown that the entry certificate officer, in the exercise of his discretion, had taken into account some matter which he ought to have excluded or had failed to take into account some matter which ought to have been included. This restricted view of his role was rejected by the Court. In its judgment, it reaffirmed that the actions of inferior tribunals remain subject to the controlling jurisdiction of the superior courts and the prerogative remedies of certiorari and mandamus. In the opinion of the court, the adjudicator was required<sup>3</sup> to apply his mind afresh to the problem presented by the facts and to determine what in his judgment was the correct exercise of discretion.<sup>4</sup> He had erred in law in following a rule previously applied with some strictness by the Court of Appeal to the exercise of discretion by a High Court Judge. In the circumstances of the case, however, the Divisional Court declined to interfere while it was still open to the appellate tribunal to deal with the error. But, as the Lord Chief Justice observed:<sup>5</sup>

our supervisory powers are still available if in the end, when the appellate system has worked outside it, injustice or breach of the law remains.

It is important once again to note the interaction between the statutory system of appeals and the common law remedies. The former provides the appellant with the means of challenging the merits of a policy decision. It also allows the exercise of discretion to be confined and permits due recognition to be given to competing considerations. The common law remedies, such as certiorari, mandamus and habeas corpus, do not generally intrude upon the 'policy' side of decision making,<sup>6</sup> but influence and structure the exercise of power by requiring it to conform with certain minimum conditions of fairness and by controlling abuse. They define, as it were, the outer fringes of the power, and represent the substance of that requirement of international law, that decisions be in accordance with and controlled by the law.

It is to these remedies in particular that one must look when the statutory rights are excluded, for clearly control may be hampered by the Secretary of State's certificate that national security or political reasons are involved. The common law remedies operate to prevent manifest abuse, but there is still much

<sup>1</sup> Cf. *Jordan v. Secretary of State*, [1972] Imm. A.R. 201.

<sup>2</sup> [1972] Imm. A.R. 253.

<sup>3</sup> Under the Immigration Appeals Act 1969, section 8 (1) (a) (ii), re-enacted in Immigration Act 1971, section 19 (1) (a) (ii).

<sup>4</sup> Here he ought to have considered anew the degree of hardship which would be caused to a girl if she had to leave England in order to live with her husband in his own country.

<sup>5</sup> [1972] Imm. A.R. 253, at p. 257.

<sup>6</sup> See *R. v. Governor of Pentonville Prison, ex parte Azam*, [1973] 2 W.L.R. 949, *per* Lord Denning M.R., at pp. 962-3.



to be said in favour of the independent development of something akin to the continental and E.E.C. concept of *ordre public*.<sup>1</sup>

*Destination*: Finally, in respect of the United Kingdom, it may be noted that, although rights of appeal against deportation are frequently restricted, in all cases the individual concerned has a right of appeal against directions for his removal on the ground that he ought to be removed, if at all, to a country or territory specified by him and other than the one named in the directions.<sup>2</sup> In most cases, a person to be deported will be removed to the State of which he is a national or which has most recently issued him with a travel document.<sup>3</sup> It has been held that an appeal against proposed destination will only succeed, *inter alia*, if the appellant can show another State which is willing to receive him.<sup>4</sup> In each case consideration is to be given to the public interest generally, and to any additional expense which may fall on public funds.<sup>5</sup>

(d) *A hearing as an international obligation*

An appeal on the merits is clearly a procedural and substantive advantage, but it is the 'review of legality' which is principally inherent in the requirement that a decision on expulsion be 'in accordance with law'.<sup>6</sup> It is remarkable that municipal law generally is not content simply to review the form of an order of expulsion, but that it is prepared also to examine the possibility of an absence of bona fides. This factor points up the character of the power as a controlled discretion and is further evidence of the limits which States admit to their powers. International law demands that an alien be permitted to obtain redress for wrongs done to him by the State in which he is present. The content of that law may, to a wide degree, be a matter of purely domestic concern. Indeed, the expelling State is in the best position, perhaps is the only authority competent, to pronounce upon such matters. Nevertheless, as Commissioner Nielsen observed in the *Neer* case, there is clear recognition of the limits to sovereign competence in respect of matters which are the subject of domestic regulations:<sup>7</sup>

<sup>1</sup> Note in particular *Reyners v. Belgian State*, [1974] 2 C.M.L.R. 305 and *Van Duyn v. Home Office*, [1975] 1 C.M.L.R. 1, and see further below, pp. 149-54.

<sup>2</sup> Immigration Act 1971, section 17.

<sup>3</sup> 1973 H.C. No. 80, para. 54; 1973 H.C. No. 82, para. 61. State practice suggests that the principle of 'returnability' which attaches to the issue of a passport is now a rule of customary international law.

<sup>4</sup> *Secretary of State v. Croning*, [1972] Imm. A.R. 51; *Secretary of State v. Fardy*, *ibid.*, p. 192; *Ali v. Immigration Appeals Tribunal*, [1973] Imm. A.R. 33 (C.A.).

<sup>5</sup> Appeal may also be made against the refusal to revoke a deportation order: Immigration Act 1971, section 15 (1) (b); *Dervish v. Secretary of State*, [1972] Imm. A.R. 48 (humanitarian aspects considered at pp. 49-50); *Secretary of State v. Udoh*, [1972] Imm. A.R. 89; see also 1973 H.C. No. 80, para. 56; 1973 H.C. No. 82, para. 63.

<sup>6</sup> Note the availability of habeas corpus declared by the court in *R. v. Governor of Brixton Prison, ex parte Soblen*, [1963] 2 Q.B. 243 and *R. v. Governor of Pentonville Prison, ex parte Azam*, [1973] 2 W.L.R. 949. Consider also *R. v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association*, [1972] 2 Q.B. 299; the court would not interfere with a 'policy' decision, but it could and should intervene to ensure that the Council acted fairly and after due regard to conflicting interests; cf. *Liversidge v. Anderson*, [1942] A.C. 206.

<sup>7</sup> *United Nations Reports of International Arbitral Awards*, vol. 4, p. 60 (1926); see also *British Practice in International Law*, 1964-I, p. 63; 1966, pp. 111-12; 1967, pp. 112-13. Cf. Article 4, Draft Articles on State Responsibility, *Yearbook of the I.L.C.*, 1973-I, pp. 5 et seq.

. . . the domestic law and the measures employed to execute it must conform to the requirements of . . . international law, and . . . any failure to meet these requirements is a failure to perform a legal duty.

This notion of an 'objective duty' is inherent in Ago's description of international responsibility in terms of an 'internationally wrongful act', which itself springs from the failure to carry out an 'international obligation'.<sup>1</sup> That expulsion should be in accordance with the local law expresses also the rule which is prescribed by international law, and it is essential that the further consequences of that rule should not be ignored. Thus, the local law is required to conform with the standards of international law:<sup>2</sup> it must not therefore offend against the norm of nondiscrimination, and may not permit the use of expulsion as an instrument of genocide, persecution or confiscation. The prescriptive requirement of decisions in accordance with the law necessarily implies that the discretion is confined and that decisions are controlled by the law. A full appeal on the merits, or even some special administrative tribunal which hears representations, may not be demanded, especially in political and security matters where the executive enjoys the widest margin of appreciation. But the rule of international law requires that there be available some procedure whereby the underlying legality of executive action can be questioned, such as the writ of habeas corpus in common law jurisdictions.<sup>3</sup> The additional requirement of a hearing on the merits or of an opportunity to make representations, although commonly found in municipal systems, cannot be said to have gained recognition as a rule of international law. The principle, however, may be offered *de lege ferenda*. But there can be no doubt that the first rule, which denies the arbitrary and capricious nature of expulsion, is to be accepted *de lege lata*.

(e) *Personal treatment of the alien: decisions of tribunals*

Expulsion may not only be unlawful in the circumstances considered above, but it may also be tainted by reason of the personal treatment afforded to the individual by the expelling State. In *Dillon's* case, heard in 1928 before the Mexico-U.S.A. General Claims Commission,<sup>4</sup> Commissioner Nielsen noted that the sovereign right of expulsion was not denied by the United States Government, but that complaint was centred on the manner of the expulsion. Mexico and the United States had agreed, by the General Claims Convention of 1923, that all claims outstanding between the parties were to be decided 'in

<sup>1</sup> *Second Report on State Responsibility*, U.N. Doc. A/CN. 4/233; *Yearbook of the I.L.C.*, 1970-II, p. 177, at pp. 187, 190 et seq.

<sup>2</sup> *Anglo-Norwegian Fisheries* case, *I.C.J. Reports*, 1951, p. 116.

<sup>3</sup> This principle follows also from the standards of equality and national treatment and non-discrimination in the matter of legal remedies; see Articles 14, 16 and 26, International Covenant on Civil and Political Rights 1966, which 'embody and crystallize' pre-existing rules of customary international law. Cf. *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, p. 3 at pp. 37-41. See above, pp. 69 et seq.

<sup>4</sup> *United Nations Reports of International Arbitral Awards*, vol. 4, p. 368. On standards of treatment generally, see *Falcon's* case (1926), *ibid.*, p. 104; *Garcia's* case (1926), *ibid.*, p. 119; *Hopkins'* case (1926), *ibid.*, p. 41.

accordance with the principles of international law, justice and equity'.<sup>1</sup> Nielsen noted that although there may be no rule as to the precise and proper methods of expelling an alien, 'when resort is had to a use of unnecessary force or other improper treatment there may be ground for a charge, . . . account being taken of the manner in which expulsion might have been effected'.<sup>2</sup>

In an earlier case, an American citizen expelled from Mexico with unnecessary cruelty was awarded \$2,000, even though it appears that the expulsion was based on proper grounds.<sup>3</sup> The Umpire, Sir Edward Thornton, noted:

There is no excuse for the cruelty with which the claimant appears to have been treated . . . and the unnecessary and painful march to which he was subjected together with his subsequent imprisonment.

The *Maal* case in 1903 involved the expulsion of a Dutch citizen from Venezuela.<sup>4</sup> The measure had been accompanied with a variety of indignities, including the stripping of the complainant in public, and this was held to be unnecessary and oppressive, going beyond what would have been justifiable in the admittedly troubled times. The Netherlands and Venezuela agreed that the claims between them were to be decided according to justice, 'upon a basis of absolute equity without regard to objections of a technical nature or the provisions of local legislation'.<sup>5</sup> Five hundred dollars in gold were awarded in this case solely for the indignities, the Commission noting that expulsion is justified only where the foreigner's presence is detrimental to the welfare of the State, and when accomplished 'with due regard to the convenience and personal and property interests of the person expelled'.

In so far as such statements express general principles they continue to be valid; in each case it will be necessary to consider the circumstances of any arrest or detention which may precede expulsion. If the arrest is wrongful or the detention unreasonable, these facts will aggravate the damages which may be

<sup>1</sup> Article I, Mexico-U.S.A. General Claims Convention, 8 September 1923, *United Nations Reports of International Arbitral Awards*, vol. 4, p. 11. Compare the Special Claims Convention of the same year for claims arising from 'revolutionary acts': *ibid.*, p. 779. Article II of this Convention declared that settlement was to be in accordance simply with justice and equity and not according to the generally accepted rules and principles of international law, for the Mexican Government felt 'morally bound to make full indemnification'.

<sup>2</sup> *Ibid.*, p. 368 at pp. 369-70. Cf. the case of *Hannah Jenkins*, American-Turkish Claims Settlement, cited in Nielsen, *Opinions and Report* (Washington, 1937), p. 463: 'It is probably a correct view that the departure of an alien from a nation's territory may be compelled by virtue of a sovereign right, the precise methods of whose exercise are not prescribed by international law. The legal right to this harsh measure undoubtedly exists' (at page 465). In the circumstances of this case, there was no evidence of arbitrary action upon which an international claim could be based.

<sup>3</sup> *Gourrier's* case (1868): Whiteman, *Damages in International Law*, vol. 1, pp. 483-4, 507; see also *Snelling's* case, *ibid.*

<sup>4</sup> *United Nations Reports of International Arbitral Awards*, vol. 10, p. 730: Whiteman, *Damages in International Law*, vol. 1, pp. 488 et seq., 507. See also *Boffolo* case, *United Nations Reports of International Arbitral Awards*, vol. 10, p. 528; *Affaire Chevreau*, *ibid.*, vol. 2, p. 1113; *Orazio de Atellis*, Moore, *International Arbitrations*, vol. 4, p. 3333 (injury to health and reputation; obliged to leave through fever-ridden port).

<sup>5</sup> Mixed Claims Commission, Netherlands-Venezuela 1903, Protocol, Article I, *United Nations Reports of International Arbitral Awards*, vol. 10, p. 709.



due for unlawful expulsion. The obligations which a State owes in these matters are clearly established and any breach will involve the guilty State in international responsibility.<sup>1</sup> It should be noted that detention may not only be too long, but may also be unreasonably short, leaving the alien no time in which to arrange his affairs. These matters also must be taken into account in assessing the damage done.<sup>2</sup>

In recent years the British Government has continued to protest about the conditions in which expulsions are carried out. In 1966, for example, the United Kingdom High Commissioner in Nigeria expressed concern at both the absence of any reason given for the expulsion of a resident journalist and the shortness of notice. Although the decision itself was not reconsidered, a temporary postponement in its execution was obtained.<sup>3</sup> In 1967, strong representations were made on the expulsion of twelve United Kingdom citizens from Kenya on twenty-four hours notice. Although there was express recognition of the Kenyan Government's right of expulsion, complaint was made about the shortness of notice and the general lack of consideration.<sup>4</sup>

(f) *Compensation for expulsion*

There is a distinct lack of cases involving claims for expulsion alone, and protecting States frequently confine themselves to diplomatic representations and protest. This fact or tendency is good evidence of the reluctance of States to seem to deny to others powers which they may themselves need at some future date. However, in other cases, expulsion is often to be found as one of the heads in a wider claim for damages. Clearly, personal injury and property loss are among the most important of such heads, and serve to raise the issue of international responsibility.

In the assessment of damages for wrongful expulsion, Whiteman notes that consideration is generally given to the following matters:<sup>5</sup> (a) the expenses of removal and return; (b) actual property losses; (c) interruption to established business ventures;<sup>6</sup> (d) the number of dependants; (e) the character of the claimant;<sup>7</sup> (f) the indignity involved in the expulsion; and (g) the affront to the

<sup>1</sup> See *Dillon's case*, *United Nations Reports of International Arbitral Awards*, vol. 4, p. 368; *Neer case*, *ibid.*, p. 60; *Janes' case*, *ibid.*, p. 82.

<sup>2</sup> See, for example, *Faurett's case* (1904), Whiteman, *Damages in International Law*, vol. 1, p. 433; *Orazio de Atellis*, Moore, *International Arbitrations*, vol. 4, p. 3333.

<sup>3</sup> *Hansard*, H.C. Deb., vol. 731 (Written Answers), col. 45: *British Practice in International Law*, 1966, pp. 111-15.

<sup>4</sup> *Hansard*, H.C. Deb., vol. 750, cols. 97-100: *British Practice in International Law*, 1967, pp. 112, 114. See also on detention without trial and the duty to permit access by consuls: *ibid.*, pp. 116-17; *British Digest of International Law*, vol. 6, pp. 178 et seq. Note *Ben Tillett's case*, 1898, in which the British Government, admitting the right to expel, nevertheless argued that arrest was unnecessary and was accompanied by hardship. The arbitrator deduced the permissibility of means necessary to ensure expulsion from the general right to expel (*British Digest of International Law*, vol. 6, pp. 124 et seq., 147). On the facts, the allegations of ill-treatment were found to be unproven.

<sup>5</sup> Whiteman, *Damages in International Law*, vol. 1, p. 513.

<sup>6</sup> *Gowen and Coepland's case*, *ibid.*, p. 491; \$20,000 allowed for loss of guano deposits and exploitation rights.

<sup>7</sup> Compare *Boffolo's case* (above, p. 132 n. 4), a man of 'low character' who was permitted to

claimant's State.<sup>1</sup> The Commission set up by the British Government after the South African expulsions of 1900 drew a clear distinction between actual pecuniary loss, for which damages were recoverable, and so-called 'moral' damages, which were not recoverable. In *Charilaos'* case,<sup>2</sup> the Commission was faced with a total claim of £616 for loss of property, together with a claim for the loss of £2 to £3 per day from the claimant's tea-room. The Commission first disallowed £281, as no cogent evidence had been produced as to the existence of various items, including cash, securities and jewellery. Next, it was noted that furniture values depreciated in time of war by about 75 per cent., and the claim was again correspondingly reduced. The full value of clothes and a bicycle was allowed but, 'on the reasonable assumption that the values (had) been inflated', the provisional total was then reduced by one half to £59. A further reduction of £14 was then made because the Consul who acted for Greece would not vouch for the respectability of the claimant, and there was no evidence as to other means of livelihood or whether the furniture and effects had been left in good order. On the other hand, the full value of stock-in-trade (£45) was allowed, and the final total arrived at was £90.

The general findings of the Commission have been criticized above, and it is impossible to say that their approach in this one case would be typical of other arbitral tribunals. Each case will depend on its own particular facts, but it is clear that the major difficulties will arise in respect of the evidence concerning property and other interests. In arranging for the distribution of the lump sum which it received on behalf of American claimants, the United States Government distinguished between three classes: (1) those wrongfully deported who suffered no loss of property and no hardship—these were entitled only to nominal damages; (2) those wrongfully deported and who did suffer in consequence—these were to be treated generously; and (3) those who were rightly deported, but who were treated with unnecessary severity—these were entitled to some consideration.<sup>3</sup> In making its awards, the United States Government paid particular attention to business and property losses which were capable of more precise measurement.<sup>4</sup> In the *Phelps* claim, for example, the loss was corroborated and an award was made to the full extent. In many cases, however, little corroborative evidence was available, and consideration was then given to the circumstances of arrest, detention and deportation as the basis for other awards. These were substantial where no reasons for the arrest and deportation were forthcoming, and where the claimant had not been allowed to communicate with friends.<sup>5</sup> In one case the claim was rejected because the claimant

return within a month—\$380, with *Oliva's* case (above, p. 97 n. 6), a man of standing and character and recognized by the Venezuelan Government as a worthy concessionary—\$7,720, plus an indemnity for business losses.

<sup>1</sup> It may be that the State can also claim for the loss incurred by receiving groups of nationals without adequate notice; see Brownlie, *op. cit.* (above, p. 121 n. 2), p. 506.

<sup>2</sup> *British Digest of International Law*, vol. 6, pp. 227 et seq.

<sup>3</sup> Whiteman, *Damages in International Law*, vol. 1, p. 498.

<sup>4</sup> See the breakdown of awards in Whiteman, *op. cit.* (previous note), pp. 501-6.

<sup>5</sup> e.g. cases of *Anderson* and *Crus*, *ibid.*, pp. 504-5.

had suffered 'no damage by his deportation from South Africa to his home in America'.<sup>1</sup>

While there is ample support for the principle that compensation is due for injuries caused by an unlawful expulsion, the question of readmission remains open. It will often be demanded in the course of diplomatic protest and negotiation,<sup>2</sup> but the position may be that the expelling State is entitled to consider the payment of a sufficient sum of money as adequate compensation. If this is, indeed, the case, then the discretionary power of States is considerably widened and the consequences of a breach of international obligations are significantly reduced.<sup>3</sup>

(g) *Conclusions relating to the manner and form of expulsion*

1. General international law imposes as a precondition to the validity of an order of expulsion the requirement that it be made in accordance with law.

2. An order of expulsion will only be in accordance with law if

(a) it is permitted under the local law;

and either

(b) the alien is allowed a hearing and appeal on the merits;

or

(c) there exists an effective remedy (judicial review), whereby the legality of the exercise of power can be challenged.

3. Expulsion proceedings generally must be carried out in accordance with the general standards which international law has established for the treatment of aliens. There must be no ill treatment or torture and due regard must be paid to the dignity of the individual and to his basic rights as a human being.

4. International responsibility attaches to the expelling State which acts in breach of its international obligations, and compensation may be demanded by the State of which the alien is a national. Although readmission of the alien may be demanded, State practice does not support the existence of an obligation in the matter; the payment of damages and the making of an apology are generally considered sufficient.

## V. THE IMPRESSION OF TREATY OBLIGATIONS UPON THE GENERAL POWER OF EXPULSION

### I. INTRODUCTION

Expulsion may not only be accomplished in such a way as to depart from the standards of general international law, but it may also violate obligations

<sup>1</sup> *Maloney's case*, *ibid.*, p. 505. The claimant had been a bartender, had been continually under the eyes of the police, and was well known as a 'longstall for pickpockets'. Actual pecuniary loss and indignity are not essential prerequisites to an award of damages, and these may be allowed where the other wrongs done to the alien are 'aggravated': *Whiteman*, *op. cit.* (above, p. 134 n. 3), p. 514; *Zerman's case*, *Moore, International Arbitrations*, vol. 4, p. 3348.

<sup>2</sup> See remarks by the Secretary of State on the refusal of re-entry by the Cyprus Government to an alien resident for over forty years: *Hansard*, H.C. Deb., vol. 706, cols. 184-5, cited in *British Practice in International Law*, 1965-I, pp. 46-7.

<sup>3</sup> See Brownlie on 'incomplete privilege': *Principles of Public International Law* (2nd ed., 1973), pp. 452-3.



expressly assumed in treaties. Bilateral treaties of commerce and establishment play a major role in putting nationals of States parties in a privileged position in matters of entry and expulsion, but due regard must be paid also to the compelling effect of multilateral treaties and other international instruments, whose primary concern is with human rights. The importance of such instruments in the setting of standards was briefly considered above,<sup>1</sup> although some caution was advised in the evaluation of recent conventional provisions, particularly in view of the low level of ratifications.<sup>2</sup> While the details of such provisions still fail to qualify as rules of customary international law, and while the entry into force of the principal covenants did not occur until early 1976, nevertheless the agreements in question may yet indicate the content of present human rights standards. Thus, there is throughout an insistence on certain minimum rights, on the procedural guarantees of due process and the right of appeal, and on the recognition of the rule of law as the very minimum protection against arbitrary treatment.

Rights of greater substance will usually result from bilateral treaties, but in general such rights are of most importance once the treaty alien has secured admission and has established himself in business.<sup>3</sup> In the past, diplomatic protest frequently followed the application of discriminatory policies to treaty aliens in matters of admission,<sup>4</sup> and the situation was much the same in regard to expulsion or conditions of residence. In 1874, United States Secretary of State Mr. Fish suggested that a law or ordinance affecting those of a specific faith might be the sort of law which the commercial treaty with Russia of 1832 expressly anticipated would also apply to treaty nationals.<sup>5</sup> Nevertheless, in the case of one *Rosenstrauss* he concluded that the withholding of a trading licence solely on account of religious faith appeared to be in direct violation of the treaty.<sup>6</sup>

In the case of *Orazio de Atellis*,<sup>7</sup> the United States Government claimed that the expulsion violated not only the rights secured to inhabitants by the Constitution, but also infringed the United States-Mexico treaty of 1832 which guaranteed to the citizens of each country, while within the jurisdiction of the

<sup>1</sup> See above, pp. 64 et seq.

<sup>2</sup> See above, pp. 68 et seq.

<sup>3</sup> But treaties do operate to secure admission. In the case *Re Nakana and Okazake*, 13 Brit. Col. Rep. 370 (1908) the provisions of a provincial immigration act discriminating against 'orientals' were held inoperative in so far as subjects of the Japanese Empire were concerned. The 1907 Treaty between Canada and Japan, which had been enacted by federal statute of the same year, expressly provided for full liberty to enter, travel or reside in favour of the nationals of both parties. See also the categories 'treaty trader' and 'treaty investor' provided for in the United States Immigration and Nationality Act 1952, s. 101 (a) (15) (E); 8 U.S.C. s. 1101 (a) (15) (E), and in such treaties as that concluded with Japan in 1953, Article I: *United Nations Treaty Series*, vol. 206, p. 143; *American Journal of International Law*, 69 (1975), pp. 142-3.

<sup>4</sup> *British Digest of International Law*, vol. 6, pp. 37 et seq.

<sup>5</sup> Moore, *Digest*, vol. 4, p. 111. See similarly, *Mr. Lewisohn's case* 1881-2, *British Digest of International Law*, vol. 6, pp. 158 et seq.; German discriminations against American Jews, Hackworth, *Digest*, vol. 3, pp. 643 et seq.

<sup>6</sup> Moore, *Digest*, vol. 4, pp. 112-13. See also the case of *Pinkos*, *ibid.*, pp. 114-16; case of the *Mormon missionaries* in Switzerland, 1924, Hackworth, *Digest*, vol. 3, p. 697.

<sup>7</sup> Moore, *International Arbitrations*, vol. 4, p. 3333.

other, 'special protection' for their 'persons and property', leaving 'open and free the tribunals of justice'.<sup>1</sup> Essentially, the treaty assumed the protection of interests and the availability of a right of appeal, but it was never suggested that a treaty of commerce might abolish altogether the right of expulsion. In the *Gardner* case, the Board of Commissioners said:<sup>2</sup>

It is not to be presumed that either nation, by any article or stipulation of the treaty . . . , intended to deprive itself of taking a reasonable measure of precaution against an injury likely to result immediately from the residence of one national in the territory of another.

This view has been reaffirmed in other contexts, and there seems to be a presumption that, in the absence of express provisions to the contrary, treaties of friendship, commerce and navigation 'should not be considered as renouncing such an important attribute of sovereignty as the right of expulsion'.<sup>3</sup> Where such treaties exist, it will be assumed that the immigration laws continue to apply and that expulsion remains available. At the same time, it must follow that the general power is limited in view of those obligations which the parties have agreed to bear. Only occasionally will the parties agree to limit expulsion to serious infractions of 'ordre public',<sup>4</sup> but it is more common to find express and reciprocal guarantees of access to the courts and the provision of rights of appeal. It is this type of provision which, by submitting discretionary powers to control by the law, ensures a certain protection against arbitrary treatment.

## 2. EXPULSION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The European Convention does not, by its express terms, guarantee the right of residence in any particular State.<sup>5</sup> Nevertheless, it is apparent that both a refusal of admission and an order of expulsion may be prohibited indirectly, in the sense that their execution would amount to the violation of some other

<sup>1</sup> Cf. case of *Alexander A. Atocha*, Whiteman, *Damages in International Law*, vol. 1, p. 469.

<sup>2</sup> Whiteman, *op. cit.* (previous note), p. 476 and note to p. 497. In fact, *Gardner* was a confidence trickster who had never owned the silver mine which he claimed to have lost, nor had he been expelled.

<sup>3</sup> United States Department of State to the Consul General at Hamburg, 1912, on the question whether Articles VI and VIII of the Convention of Friendship, Commerce and Navigation of 1827 between the United States and the Hanseatic Republic stood in the way of expulsion. Opinion cited in the case of *Lazar Rokach*, American-Turkish Claims Settlement, *Opinions and Report*, F. K. Nielsen (1937), p. 503 at p. 509. See also Moore, *Digest*, vol. 4, p. 80; Hackworth, *Digest*, vol. 3, p. 692.

<sup>4</sup> e.g. Article 2 (2), Italy-Germany Treaty of Friendship, considered in decision of the Oberverwaltungsgericht, Hamburg (1966): *VerwRspr.* Bd. 18 S. 737. See also decision of the Bundesverwaltungsgericht (1971); *BVerwGE.* Bd. 37 S. 227 (Germany-Greece, Treaty of Establishment).

<sup>5</sup> Application 238/56: *Yearbook of the European Convention on Human Rights*, 1 (1958), p. 205; Application 434/58: *ibid.*, 2 (1959), p. 354; Application 3325/67: *ibid.*, 10 (1967), p. 528; see also *Residence of an Alien Trader (Germany)* case, I.L.R., 21 (1954), p. 209.

protected right, such as those covered by Articles 3, 5, 8 and 14 of the Convention. In one case, the Commission observed:<sup>1</sup>

L'expulsion d'un étranger peut, dans certaines conditions exceptionnelles, constituer un traitement inhumain ou dégradant au sens de l'article 3 . . .

Regard must also be had, both in matters of entry and expulsion, to the special position occupied by the family.<sup>2</sup> Forcible removal or the refusal of entry might well effect the separation of husband and wife, and to that extent could constitute a breach of Article 8 of the Convention. In Application 2535/65 *v.* Federal Republic of Germany,<sup>3</sup> the applicant alleged just such a breach in regard to the proposed deportation of her husband on account of his many criminal convictions. In the circumstances, the Commission declared the claim inadmissible as being manifestly ill-founded. It noted that the applicant had the opportunity of leaving Germany with her husband and of living with him in Austria, his own State. The applicant had married after the expulsion order had been made, and consequently knew the situation and the risks involved.<sup>4</sup>

In fact this case illustrates one aspect of the position which at present prevails in German municipal law. Under the Federal Constitution, general international law and the specific provisions of bi- and multilateral treaties are incorporated into the local law.<sup>5</sup> Where treaties such as the European Convention on Human Rights, the European Convention on Establishment or the Treaty of Rome are concerned, the individual can plead his treaty rights before the national courts.<sup>6</sup> For example, in a decision in 1956, the Federal Administrative Court (*Bundesverwaltungsgericht*) held that, by virtue of Article 6 of the Constitution and Article 8 of the European Convention, the family is under the 'special protection' of the State.<sup>7</sup> The alien threatened with expulsion in this case had subsequently married a German woman who was the mother of a number of illegitimate children. In the view of the court, due regard must be paid to the likely effect of the order of expulsion on the family. If the unity and the integrity of the family are likely to be compromised, then it is essential that the interests of family protection be taken into account and set against the competing demands of *ordre public*.<sup>8</sup> These conditions had not been fulfilled and the expulsion was accordingly annulled. This discretionary power which the authorities enjoyed was thus to be confined within the limits of its essential function, namely, the protection of the State. The demands of public interest are not absolute and they can, and must, yield where the interests of the family are dominant. By contrast, the expulsion

<sup>1</sup> Application 984/61: *Recueil* (European Commission of Human Rights), vol. 6. The Commission had in mind the expulsion of an individual to a State in which he faced persecution or the death penalty.

<sup>2</sup> See *Patel et al. v. United Kingdom*, Decision of the Commission on Admissibility of Applications 4478/70, 4486/70, 4501/70 (October, 1970).

<sup>3</sup> *Recueil*, vol. 17, p. 28.

<sup>4</sup> See also Application 3898/68 *v.* United Kingdom, cited in *Case Law Topics*, No. 12, pp. 10-11.

<sup>5</sup> *Grundgesetz*, 1949, Article 25.

<sup>6</sup> Schiedermaier, *Handbuch des Ausländerrechts der Bundesrepublik Deutschland* (1968), p. 22.

<sup>7</sup> Cited in *Yearbook of the European Convention on Human Rights*, 2 (1959), p. 584.

<sup>8</sup> Note the 'public interests' set out in Article 8 (2). The court in this case accepted the family as a unit, even though the husband had no parental connection with the children born prior to the marriage.



of a divorced husband and father was upheld in a more recent decision. The divorce, said the court, had removed the appellant from the family unit, but again it noted that even the divorced parent without custody has a right of access, and this too must be weighed in the balance against the public interest.<sup>1</sup>

(a) *The Fourth Protocol*

Although the alien may be able, indirectly, to invoke one or more of the rights guaranteed by the Convention, there are obvious deficiencies in this sort of protection. The Council of Europe has attempted in the past to encourage States to accept more specific obligations in favour of aliens, and in 1968 the Fourth Protocol to the Convention entered into force. However, many of the provisions which were originally intended to benefit aliens were substantially altered by the Committee of Experts.<sup>2</sup>

Article 2 of the Protocol prescribes freedom of movement and residence for every one lawfully within the territory of a State Party and the freedom of every one to leave any country, including his own.<sup>3</sup> These rights are subject to the usual restrictions 'in accordance with law and necessary in a democratic society', but here again it is to the substance of the rights and of the permitted restrictions that one must look, in order to ascertain the limits within which the State's discretion is confined.<sup>4</sup> The final wording of this Article represents a compromise between the recommendations of the Consultative Assembly and the Committee of Experts. For example, the word 'lawfully' was substituted for 'legally' in order to take account of the wide discretionary powers commonly granted to administrative authorities in matters of entry and exclusion. It was also agreed by the Committee that an alien who is admitted under certain conditions of entry which he transgresses can no longer be regarded as 'lawfully' in the country.<sup>5</sup> In addition, it should be noted that Article 2 does not grant or guarantee the right to work to aliens lawfully present, nor does it ensure freedom of choice in the matter of place of work. To regulate the issue of work permits in the light of social and economic needs is therefore quite permissible.

Article 3 of the Protocol declares that no one shall be expelled<sup>6</sup> by means either of an individual or collective measure from the State of which he is a

<sup>1</sup> *VerwRspr.* Bd. 19 S. 960, decision of the Oberverwaltungsgericht, Münster (1968); see also *VerwRspr.* Bd. 18 S. 14 (Bundesverfassungsgericht, 1966); *VerwRspr.* Bd. 20 S. 330 (OVG, Münster, 1968); *VerwRspr.* Bd. 22 S. 359 (BVerwGE, 1970); *BVerwGE.* Bd. 35 S. 291, 296-7 (1970).

<sup>2</sup> The Protocol entered into force on 2 May 1968 between Denmark, Iceland, Luxembourg, Norway and Sweden. By 31 December 1970 it had also been ratified by Austria, Belgium, the Federal Republic of Germany and Ireland: *Explanatory Reports on the Second to Fifth Protocols to the European Convention on Human Rights* (Council of Europe, 1971) (Doc. H (71) 11).

<sup>3</sup> Fourth Protocol, Article 2 (1) (2). Cf. Article 12 (1) (2), International Covenant on Civil and Political Rights.

<sup>4</sup> Article 2 (3), and note the somewhat wider provision of paragraph (4). Cf. Article 12 (3), Covenant on Civil and Political Rights, which appears to be narrower in scope.

<sup>5</sup> Council of Europe, *Explanatory Reports*, pp. 40-1.

<sup>6</sup> The Committee preferred 'expelled' to 'exiled', even though it applies normally only to aliens. Expulsion was to be understood in its usual sense, to drive away from a place, but it was agreed that extradition was not included: Council of Europe, *Explanatory Reports*, p. 47.

national, and that no one shall be deprived of the right to enter the territory of the State of which he is a national.<sup>1</sup> This provision may raise particular problems in regard to nationality. The Committee of Experts proposed the inclusion of a clause to the effect that 'a State would be forbidden to deprive a national of his nationality for the purpose of expelling him',<sup>2</sup> but this was dropped because of doubts about touching on the controversial character of denaturalization measures. In subsection (2), the phrase 'No one shall be deprived of the right to enter' was substituted for the original wording, 'Every one shall be free to enter' in order specifically to permit to States the power to investigate claims to nationality at the port of entry, and also to permit the imposition of any necessary quarantine measures.<sup>3</sup>

It is the content of Article 3 which remains the basis of the continuing failure of the United Kingdom to ratify the Fourth Protocol. Under the Commonwealth Immigrants Act 1968, and now under the Immigration Act 1971, the United Kingdom authorities have the power to deport or otherwise remove non-patrial United Kingdom citizens. As a rule, such citizens will be removed to that Commonwealth territory to which they can be said to 'belong'. Alternatively, when permission to land has been refused, the prospective entrants may be subjected to the 'shuttlecocking' procedure which involves removal to the point of embarkation for the United Kingdom.<sup>4</sup> Immigration control as currently practised by the United Kingdom demands the mandatory exclusion of any non-patrial United Kingdom citizen who arrives without a special voucher or other entry clearance.<sup>5</sup> Acceptance of the obligations in Article 3 of the Protocol would entail a complete review of existing controls, and continued distinctions between different classes of United Kingdom citizens would constitute violations of Article 3 alone and in conjunction with Article 14.<sup>6</sup>

Some sort of solution would appear to be provided by Article 5 (4) of the Protocol. This provides that the territory to which the Protocol applies, and each territory to which it is applied by declaration of a Contracting Party, shall be treated as separate territories for the purposes of the references in Articles 2 and 3 to the 'territory of a State'. Article 5 (1) makes provision for the extension of the Protocol to any territories for the international relations of which the Contracting

<sup>1</sup> Note *Patel et al. v. United Kingdom*. Cf. Article 12 (4), International Covenant on Civil and Political Rights: 'no one shall be arbitrarily deprived of the right to enter his own country'. The Committee rejected this formulation of 'his own country' as being vague and imprecise.

<sup>2</sup> Council of Europe, *Explanatory Reports*, pp. 47-8.

<sup>3</sup> *Ibid.*, p. 48. However, it was accepted that the right declared was not absolute, in the sense of a right to remain in that territory. Thus, the extradited criminal sentenced in another State would not enjoy an unconditional right to seek refuge in his own State: *ibid.*, p. 49.

<sup>4</sup> In *Patel et al. v. United Kingdom* the Government argued that if a person were sent repeatedly back and forth between different countries, that might ultimately raise a question under Article 3 of the Convention, which prohibits inhuman treatment. Otherwise Article 3 was directed solely at the prevention of physical or mental maltreatment and suffering and could not be extended to a refusal of entry under immigration laws: *Decision of the Commission as to Admissibility*, 10 October 1970, pp. 23-4. But the Commission felt that such measures raised issues of law and fact properly dealt with on an examination of the merits: *ibid.*, pp. 35-7.

<sup>5</sup> 1973 H.C. No. 79, para. 38.

<sup>6</sup> Note the observations of the Commission in *Patel's case*, *loc. cit.* (above p. 138 n. 2), p. 36.



State is responsible. If the United Kingdom were to take advantage of this provision, it would be entitled to continue to exclude and expel those United Kingdom citizens who derive their status from connection with a dependent territory. Immigration controls could be maintained, for example, in respect of United Kingdom citizens from Hong Kong. However, the United Kingdom would not be entitled to maintain such restrictions against United Kingdom citizens resident in independent countries, such as Uganda or Kenya, which are not within the purview of Article 5 (1). The necessary changes in the immigration laws do not, at the present time, appear to be acceptable to the Government of the United Kingdom.

Finally, Article 4 of the Protocol prohibits the collective expulsion of aliens. This was inserted solely on the initiative of the Committee of Experts, and it bears little or no relation to what was actually proposed by the Consultative Assembly. The latter body wished to include wide ranging provisions regulating the individual expulsion of aliens, but these were rejected by the Committee of Experts.<sup>1</sup> The Assembly had proposed:<sup>2</sup> (1) a lawfully resident alien<sup>3</sup> should be expelled only if he endangers national security or offends against *ordre public* or morality; (2) except where imperative reasons of national security otherwise require, an alien who has been lawfully resident for more than two years in the territory of a Contracting Party should not be expelled without first being allowed to avail himself of an effective remedy before a national authority within the meaning of Article 13 of the Convention; (3) an alien who has been lawfully residing for more than ten years should be liable to expulsion only for reasons of national security or if the reasons mentioned in (1) are of a particularly serious nature.<sup>4</sup>

For a number of reasons, the Committee of Experts was unwilling to touch on the question of individual expulsions. It argued that these were adequately covered already by Article 3 of the European Convention on Establishment, and that further provisions would result in the risk of conflict between the two sets of rules.<sup>5</sup> More to the point was the refusal of the Committee to accept any express limitations on the reasons which may justify expulsion. A majority maintained that the State concerned should alone be competent to appreciate the reasons which, according to its own law, might lead to expulsion,<sup>6</sup> and that such matters were not the proper subject of control by the organs of the Convention.<sup>7</sup> These

<sup>1</sup> Cf. the limitations on the expulsion of individual aliens in Article 13, International Covenant on Civil and Political Rights, 1966.

<sup>2</sup> Council of Europe, *Explanatory Reports*, pp. 49-50.

<sup>3</sup> Note the intended restriction by way of the word 'lawfully', above, p. 139.

<sup>4</sup> Note the decisions of German courts, which have largely adopted these criteria in respect of treaty aliens and as a general basis for controlling the discretion of the authorities: below, pp. 147-9. Note also the notions of *Aufenthaltsberechtigter*, *résident privilégié*, and 'settled' Commonwealth citizen, in German, French and United Kingdom law respectively.

<sup>5</sup> On Article 3, see further below, pp. 145 et seq.

<sup>6</sup> Recognition was given to the overriding principle that 'the decision of expulsion must be taken in accordance with law', i.e. within the reasons and procedure provided by internal law: Council of Europe, *Explanatory Reports*, p. 51. A provision permitting review of the *legality* of expulsion proceedings was considered acceptable, but not a substantive appeal going to the merits.

<sup>7</sup> Council of Europe, *Explanatory Reports*, p. 51.



conclusions are, perhaps, the more surprising in the light of the obligations which States have assumed under Article 15 of the Convention.

(b) *The example of emergency measures taken under Article 15*

Paragraph (1) of this Article permits States parties, in time of war or other public emergency threatening the life of the nation, to take measures derogating from their obligations under the Convention. This exceptional competence is qualified by the condition that the measures taken must be those strictly required by the exigencies of the situation, and must not be inconsistent with the States' other obligations under international law.<sup>1</sup> The words 'public emergency threatening the life of the nation' suggest the application of an objective test to the facts in any given situation, and this has been the interpretation adopted by the Court and the Commission. In the first *Cyprus* case (*Greece v. United Kingdom*),<sup>2</sup> the Commission ruled that it was competent to declare on the existence of a public danger and on whether the measures taken were required, although 'the Government should be able to exercise *a certain measure of discretion* in assessing the extent strictly required by the exigencies of the situation'.

In the *Lawless Case*,<sup>3</sup> the approach of the Court reflects a similar view, although its concern was primarily with the facts of the situation and the notion of a 'margin of discretion' was not called directly in aid. The provisions of Article 15, and of the second paragraph of each of Articles 8 to 11,<sup>4</sup> are open to both an objective and a subjective interpretation. The latter has been rejected in practice, and neither the Commission nor the Court will accept a Government's simple assertion in the matter as conclusive. It has been argued,<sup>5</sup> and this is in line with what has been said earlier on expulsion in general international law, that the 'margin of appreciation' occupies a middle position in these interpretations. The State enjoys a certain freedom of decision largely because it is in the best position to know the relevant facts, and because it is best placed to assess the measures which those facts may reasonably require. Whereas the existence of the facts can be determined objectively, the State's actions on the facts are controlled by the requirements of reasonableness and good faith. Thus, the measures taken must not be employed for purposes other than the intended purposes. Article 18 of the Convention declares:

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

This important provision expresses the essence of the notion of abuse of rights in international law, and of municipal law prohibitions on bad faith and *détournement de pouvoir*.<sup>6</sup>

<sup>1</sup> Additional restrictions are imposed by paragraphs (2) and (3).

<sup>2</sup> Application 176/56: *Yearbook of the European Convention on Human Rights*, 2 (1959), p. 177.

<sup>3</sup> *Ibid.*, 4 (1961), p. 438.

<sup>4</sup> These paragraphs permit restrictions on the rights and freedoms guaranteed which are reasonably necessary in a democratic society.

<sup>5</sup> Fawcett, *The Application of the European Convention on Human Rights* (1969), p. 248.

<sup>6</sup> See Application 493/59: *Yearbook of the European Convention on Human Rights*, 4 (1961),

*(c) Procedural guarantees for aliens*

In further debate on the Fourth Protocol, the Committee of Experts studied the possibility of including certain procedural guarantees in favour of aliens about to be expelled. These would have provided for a hearing and the opportunity to make representations before the competent authority, except in cases where the State considered that compelling reasons of national security required otherwise. The Committee rejected this proposal on the ground that to limit guarantees to those of a procedural nature was insufficient—it was better to have no provision at all. First, the guarantees would not apply where the State ‘considers compelling reasons otherwise required’.<sup>1</sup> Secondly, the ‘competent authority’ might well be the same body which had taken the original decision and there could, therefore, be no guarantee of impartiality.

*(d) Conclusions regarding the European Convention*

The Committee’s response to the recommendations of the Consultative Assembly reflects the continuing desire of governments to retain the broadest margin of appreciation in their dealings with foreign nationals, and for the time being discretion in this area must remain only indirectly confined by the Convention. Development of the concept of a ‘European public order’, however, could prove to be the means by which all States parties came to recognize their own interest in and concern with the treatment of aliens throughout the Continent. The guarantees which the Convention does provide reflect closely the standards of general international law examined above. There can be no doubt that an expulsion would also be in breach of the Convention if it resulted in personal injury, or damage to the property, of an alien, if it was executed in breach of the local law, or without due consideration being given to his family, or if it led to the alien’s removal to a State in which he faced political or other persecution. Although States alone may be competent to decide upon the adequacy of the reasons for expulsion, the Convention clearly requires that the alien be permitted to challenge the legality of his arrest and detention.<sup>2</sup> The fundamental assumption throughout the Convention is that discretionary powers are subject to control, and that State actions which are arbitrary, in that they are inspired by bad faith or otherwise reveal a *détournement de pouvoir*, may be challenged.

## 3. EXPULSION AND TREATIES OF ESTABLISHMENT

As their name implies, treaties of commerce and establishment operate to make easier the entry, residence and business activities of nationals in the territories of the States parties. The word ‘establishment’ is not confined to entry alone, but is a term of art applicable to all the provisions of a commercial treaty

p. 322, in which the applicant alleged that his detention in Ireland was ordered by the Government not for the purposes of preserving *ordre public* but in order to remove a political opponent.

<sup>1</sup> Cf. *Lawless* case, above, p. 142. See also present United Kingdom law and practice on expulsions in security cases, above, pp. 110–11, 112–13.

<sup>2</sup> Article 5 (1) (f), (4).

which affect the activities of aliens. The treaty itself will commonly attempt to lay down standards of treatment the general object of which is non-discrimination with regard to treaty nationals and companies, and these standards may be expressed in terms of most-favoured-nation treatment, national treatment, or treatment in accordance with the international law standard.<sup>1</sup> As a general rule, treaty provisions of this nature are not to be so construed as to affect existing laws on entry and residence, or the power to enact future regulations.<sup>2</sup> In addition, the rights prescribed are limited by reference to the aims of such treaties, namely, the encouragement of bilateral trade and investment.<sup>3</sup> There is, therefore, an underlying assumption that the power of expulsion is retained, although the aims and purposes of the treaty in question indicate the confines of State discretion. The power of expulsion cannot be used in such a way as to frustrate those aims and purposes, and it is in this light that one should view the reservation, common to treaties of establishment, which permits either party to apply measures necessary to maintain public order.<sup>4</sup>

The fact that the treaty alien remains liable to expulsion is frequently balanced by provisions which guarantee to him national and most-favoured-nation treatment regarding access to the courts,<sup>5</sup> and protection and freedom from unlawful molestation in no case less than that required by international law.<sup>6</sup> Today, the rights of access to the courts and to the equal application of justice are firmly established in general international law, whereas, in an earlier period, they resulted most frequently from the provisions of bilateral treaties.<sup>7</sup> These general principles are strengthened by the rule that a State may not adduce deficiencies

<sup>1</sup> Wilson, *United States Commercial Treaties and International Law* (1960). On 'national treatment' see Piot, 'Of Realism in Conventions of Establishment', *Clunet*, (1961), 38-84; Walker, 'United States Commercial Treaties Today', in *De lege pactorum*, Essays in honor of R. R. Wilson (ed. Deener) (1970), p. 258. On the most-favoured-nation clause, see Schwarzenberger, 'The Most-Favoured-Nation Standard in British State Practice', this *Year Book*, 22 (1945), p. 96; *International Law and Order* (1971), ch. 8; *Third Report* by Endre Ustor, Special Rapporteur, U.N. Doc. A/CN. 4/257. On the international law standard, see Wilson, *The International Law Standard in Treaties of the United States* (1953), pp. 87-105. See also Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648-1815)* (1971), *passim*.

<sup>2</sup> See, for example, *VerwRspr.* Bd. 23 S. 220 (BVerwG, 1971), on interpretation of the German-Iranian Treaty of Establishment 1929.

<sup>3</sup> Treaty of Friendship, Commerce and Navigation between the United States and Ireland 1950, Article I (*United Nations Treaty Series*, vol. 206, p. 269); see also the Protocol, para. 1 and the Minutes of Interpretation. Treaty of Friendship, etc., between the United States and Japan 1953, Article I (*ibid.*, vol. 206, p. 143). Treaty of Friendship, etc., between the United Kingdom and Japan 1963, Article 3 (*ibid.*, vol. 478, p. 86); Almond, 'The Anglo-Japanese Commercial Treaty of 1963', *International and Comparative Law Quarterly*, 13 (1964), p. 925. See also Treaty of Commerce, Establishment and Navigation between the United Kingdom and Iran 1959 (Cmd. 698): *Contemporary Practice of the United Kingdom in the Field of International Law*, VIII, *International and Comparative Law Quarterly*, 9 (1960), pp. 391 et seq. (this treaty is not in force).

<sup>4</sup> e.g. U.S.A.-Japan Treaty 1953, Article 1 (3); U.S.A.-Ireland Treaty 1950, Article 1 (3).

<sup>5</sup> e.g. U.S.A.-Japan Treaty 1953, Article 4; cf. United Kingdom-Japan Treaty 1963, Article 7.

<sup>6</sup> e.g. U.S.A.-Ireland Treaty 1950, Article 2; U.S.A.-Japan Treaty 1953, Article 2.

<sup>7</sup> Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648-1815)* (1971), pp. 100 et seq.; see also Roth, *The Minimum Standard of International Law applied to Aliens* (1949), pp. 181, 185.



in its own law with a view to avoiding its obligations, either generally, under customary international law, or specifically, under treaty.<sup>1</sup>

(a) *Reserved powers in treaties of establishment*

The total effect of treaty stipulations may not seem to be very great. There will be the usual affirmation of civil rights and freedoms, and to that extent the treaty national may be protected against arbitrary executive action. Some guarantees may also be given in respect of legally acquired rights or interests and, for example, expropriation is often limited to public purposes and to the prompt payment of just compensation.<sup>2</sup> The laws and regulations which govern admission, residence and expulsion are expressly retained, but the treaty will call for their liberal application. It follows also that entry and residence must be equitably accorded, for they are the necessary preconditions to the exercise of those economic rights which it is the aim and purpose of the treaty to secure.<sup>3</sup> However, in practice little or no clear restriction is offered in respect of the reasons of *ordre public* which may be called upon to justify expulsion. Thus, the European Convention on Establishment of 1955 expressly provides that each Contracting Party shall have the right to judge reasons of *ordre public* by national criteria.<sup>4</sup> A limited right of appeal is called for in the case of treaty aliens lawfully resident in the territory of Contracting Parties for two years or more, and they are to be allowed to make representations against their removal before the competent authority.<sup>5</sup> Most States parties permit representations on the merits to be made before some sort of advisory committee, while at the same time the normal judicial proceedings are left open, by which the alien may challenge the legal basis of executive action.<sup>6</sup> The reasons of *ordre public* which justify expulsion fall within that margin of appreciation which States enjoy. Action within the prescribed limits is only occasionally opened to direct judicial challenge, as is the case, for example, in the Federal Republic of Germany.

<sup>1</sup> *Treatment of Polish Nationals case, P.C.I.J., Series A/B, No. 44 (1932), p. 24.*

<sup>2</sup> e.g. U.S.A.-Japan Treaty 1953, Articles 5 (1), 6 (3) (4); United Kingdom-Japan Treaty 1963, Article 14. There are today some 130 bilateral treaties, to which developing countries are parties, containing provisions on the protection of foreign property. The latest published list of 105 such treaties is annexed to a Report, *Bilateral Treaties for International Private Investment*, International Chamber of Commerce, 1 December 1970.

<sup>3</sup> There will not necessarily be any liberalization in favour of those entering for purposes other than trade and investment: Piot, 'La Convention d'établissement de 25 novembre 1959 entre la France et les États-Unis d'Amérique', *Annuaire français de droit international*, 1960, pp. 953, 957-8, 960 and *passim*.

<sup>4</sup> Article 3 (1); Protocol, Section 1 (a) (1), (3). The standard of national treatment is demanded in respect of access to the courts and administrative tribunals, in the protection of rights and interests: Article 7. Section 3 of the Protocol declares that *ordre public* is to be understood in the wide sense generally accepted in continental countries, but as such it is clearly a concept of, and limited by, the law. Cf. *Guardianship of Infants case*, below, pp. 146-7.

<sup>5</sup> Article 3 (2).

<sup>6</sup> See the summary of available procedures in *First Periodical Report by the Standing Committee on the European Convention on Establishment (Individuals)*, Council of Europe (1971), pp. 21-30. For details of the United Kingdom procedure prior to the introduction of the immigration appeals system, see *Report of the Wilson Committee*, Cmnd. 3387, paras. 53-4; *British Practice in International Law*, 1964-II, pp. 207-8; 1966, pp. 115-16.

(b) *Ordre public reconsidered*

The fact remains that the extensive claims of State authorities and the apparent meaning of treaty stipulations regarding *ordre public* can be deceptive. There is already considerable authority for the view that *ordre public* is not to be allowed to nullify obligations assumed under treaty, as opposed to another view of the concept which is often advanced, and is perhaps best expressed by the following, not untypical, description:<sup>1</sup>

['Ordre public'] . . . est employé pour mettre en échec le norme . . . invoqué de façon purement négative, sous forme d'exception; et il est donc de son essence d'être imprévisible dans son intervention et illimité dans son domaine. Il justifie d'avance la substitution d'un Droit d'exception au Droit en vigueur.

Characterized in this way, the exception of *ordre public* does indeed represent an unlimited reserve of sovereign power, awaiting application by the executive, administrative and judicial authorities.

(c) *Ordre public and the Guardianship of Infants case*

In the *Guardianship of Infants* case, the Swedish Government argued that not even a treaty can modify rules of *ordre public* which guarantee the integrity of those legal principles whose respect is necessary and vital for the State.<sup>2</sup> To this claim for the exclusive application of certain internal laws, the Netherlands objected that, if it were allowed, the operation of *ordre public* would enable any contracting State to destroy the very object of the Convention in dispute.<sup>3</sup> In this case, a Dutch child residing in Sweden had been placed and maintained under the Swedish regime of 'protective custody' and it was alleged that this constituted an impediment to the guardian's right to custody which was to be determined by the national law of the child.

Sweden maintained its view that the 1902 Hague Convention must be interpreted as containing a reservation authorizing, on the ground of *ordre public*, the overruling of a foreign law which would normally be recognized as the proper law. In its judgment, the Court did not feel obliged to pronounce upon the Swedish contention,<sup>4</sup> but a number of views were expressed in separate opinions on the purview and scope of *ordre public*.

Judge Lauterpacht stated the general principle that a State is not entitled to whittle down its treaty obligations concerning one institution by enacting in the sphere of another institution provisions the effect of which is to frustrate the operation of a crucial aspect of the treaty.<sup>5</sup> In his opinion, *ordre public* did cover

<sup>1</sup> Lyon-Caen, 'La réserve d'ordre public en matière de liberté d'établissement et de libre circulation', *Revue trimestrielle de droit européen*, 2 (1966), pp. 693, 694.

<sup>2</sup> *I.C.J. Pleadings, Guardianship of Infants case* (Netherlands v. Sweden), 1958, pp. 42, 44, 122.

<sup>3</sup> *Ibid.*, pp. 99-100. See also *Belgian Linguistics case*, above, pp. 13-15.

<sup>4</sup> *I.C.J. Reports*, 1958, p. 55, at p. 70. The Court dismissed the Netherlands claim by a majority of 12-4. In its view, the 1902 Hague Convention concerning the Guardianship of Infants did not cover protection of children and young persons as this was understood by the Swedish law. In addition, the law in question did not and could not have any extra-territorial effect.

<sup>5</sup> *Ibid.*, Separate Opinion, p. 79 at p. 83.

the institution of exceptional measures for the protection of minors, even to the exclusion of guardianship.<sup>1</sup> In addition, this was a principle which must be recognized as a general principle of law in the field of private international law:<sup>2</sup>

The notion of *ordre public* . . . being a general legal conception, its content must be determined in the same way as that of any other general principle of law in the sense of Article 38 [of the Statute of the International Court of Justice], . . . namely, by reference to the practice and experience of the municipal law of civilised nations in that field.

On the general applicability of *ordre public* in treaty relations, he noted:<sup>3</sup>

When [the] State is bound by a treaty in relation to a particular subject-matter it can invoke public order *only if, in case its action is challenged, it is prepared to submit the legality of its action to impartial decision*. It is that jurisdiction which removes the notion of and recourse to *ordre public* from the orbit of uncertainty, pure discretion and arbitrariness and which endows the treaty with the character of an effective legal obligation.

Judge Spender was even less willing to compromise.<sup>4</sup> He characterized *ordre public* as a concept of municipal law and noted that treaty and conventional obligations were to be faithfully observed; the two did not mix and the provisions of municipal law could not prevail over those of treaty or convention.<sup>5</sup> If any such reservation were implied, it would be of such an indefinable character, so variable and unpredictable, so dependent upon the will of the parties, that there would be very little left in the legal sense of any obligations.

These views, and particularly those expressed by Judge Lauterpacht, can be usefully applied to the reservations of *ordre public* which have been met in treaties of commerce and establishment, and also in the provisions of municipal law. Unbridled resort to the let-out clause of *ordre public* could easily defeat the whole object of such treaties, although from a realistic point of view it is uncertain to what extent States parties would be willing to make these provisions justiciable. The case is stronger where a multilateral treaty provides the basis for a regional arrangement and for the judicial settlement of disputes. It is very strong indeed where economic, social and legal relationships are brought under one regime, as in the European Economic Community.<sup>6</sup>

#### (d) *Ordre public in the jurisprudence of the Federal Republic of Germany*

A restricted interpretation of the *ordre public* clause has already been adopted by the courts of the Federal Republic of Germany, which have gone some considerable way towards giving it substantive meaning. These developments are not solely due to a familiarity with the clause in the local law, but represent also

<sup>1</sup> Ibid., pp. 89–90.

<sup>2</sup> Ibid., p. 92.

<sup>3</sup> Ibid., p. 100, emphasis supplied.

<sup>4</sup> *I.C.J. Reports*, 1958, Separate Opinion, pp. 120 et seq.

<sup>5</sup> Ibid., p. 128. Judge Spender concluded that there could therefore be no 'reservation, exception or exclusion' of *ordre public*; in the course of his judgment he referred expressly to the *Greco-Bulgarian Communities* case, *P.C.I.J.*, Series B, No. 17 (1930), p. 32. See also *I.C.J. Reports* at p. 130 and *per* Judge Córdova, dissenting, pp. 140–2; *Treatment of Polish Nationals* case, *P.C.I.J.*, Series A/B, No. 44 (1932) at p. 24.

<sup>6</sup> See further below, pp. 149–54; also Lyon-Caen, loc. cit. (above, p. 146 n. 1), pp. 703–5.



a response to its inclusion in many treaties to which the Federal Republic is a party. In two cases it was held that working without the requisite permit was contrary to *ordre public*,<sup>1</sup> and this conclusion was based upon the requirements of economic order and upon the presumption that entry under treaty must be in accordance with the immigration laws.<sup>2</sup> In each of these two cases the court was called upon to interpret the 1960 Treaty of Establishment between Germany and Greece, but to this end it applied the definition and interpretation of *ordre public* to be found in the 1955 European Convention. In another case in 1970 a Turkish national had entered Germany under a similar treaty, but his residence permit was so restricted as to prevent him from setting up his own business.<sup>3</sup> The court noted that the issue of residence permits and the imposition of conditions was a matter for the discretion of the authorities and the appellant was unable to rely in this case on any specific provisions of the treaty, which required that entry and establishment be in accordance with the laws. However, the court affirmed that the discretion of the authorities was subject to control by the courts, and that an exercise of that power which was *ultra vires* or otherwise improper could be struck down.<sup>4</sup> In this case, the fact that the appellant was married to a German woman was not itself sufficient reason to permit unconditional residence. Such a decision did not impose separation on the couple, although in actual cases of expulsion family and marriage considerations must be weighed against the public interest. Other, more recent, cases have tended to give greater weight to the need to protect and preserve the institutions of family and marriage.<sup>5</sup> It has also frequently been emphasized that public safety and order, not revenge and punishment, are the proper issues which should underlie the decision on expulsion. Conviction for crime is not itself sufficient, although it may be a lawful precondition to the exercise of the discretion.<sup>6</sup> There will be a misuse of discretion if the authority limits the exercise of its judgment to establishing simply the existence of one of the conditions of expulsion, such as a conviction. Moreover, the authority must base the exercise of discretion upon the principle of proportionality. There must be facts which support the necessity of the measure, or otherwise it does not justify its purpose.<sup>7</sup>

<sup>1</sup> *VerwRspr.* Bd. 21 S. 335 and S. 347, decisions of the Bundesverwaltungsgericht, 1969.

<sup>2</sup> *VerwRspr.* Bd. 21 S. 347.

<sup>3</sup> *BVerwGE.* Bd. 36 S. 45.

<sup>4</sup> See Article 114, Verwaltungsgerichtsordnung (VwGO), 1960, BGBl. I, 17. Compare the powers of adjudicators under the Immigration Act 1971, section 19.

<sup>5</sup> e.g. *VerwRspr.* Bd. 25 S. 81 (VGH, Hesse, 1972); *ibid.*, S. 333 (BVerwG. 1973); *BVerfGE.* Bd. 37 S. 217, 247 (1974).

<sup>6</sup> *VerwRspr.* Bd. 19 S. 964 (BVerwG. 1969); here expulsion following conviction for manslaughter was upheld—the case involved diminished responsibility, there was a possibility of repetition and consequently a danger to public order. See, by contrast, *VerwRspr.* Bd. 25 S. 81 (VGH, Hesse), where the expulsion order was annulled. Here, a wife had killed her brother-in-law who had indecently assaulted her; the court weighed up the competing interests, noted that the prerogative of mercy had been exercised in behalf of the wife, and came down in favour of keeping the family together. Compare *VerwRspr.* Bd. 20 S. 847 (BVerwG. 1969); expulsion must not offend against the principle of proportionality, but ‘wer die Verkehrssicherheit gefährdet, gefährdet die innere Sicherheit des Staates’ (at p. 851)!

<sup>7</sup> *BVerwGE.* Bd. 35 S. 292, 293 (1970). Of particular importance is the recent decision of the Bundesverfassungsgericht (*BVerfGE.* Bd. 35 S. 382 (1973)) in which appeals by Arab students expelled after the Munich massacre were allowed. The court affirmed that the protection of the

Die Ausweisung [hat] nicht den Zweck, . . . ein bestimmtes menschliches Verhalten zu ahnden, sondern einer künftigen Störung der öffentlichen Sicherheit und Ordnung oder einer Beeinträchtigung sonstiger erheblicher Belange der B.R.D. vorzubeugen.

#### 4. EXPULSION AND THE EUROPEAN ECONOMIC COMMUNITY

One of the basic principles of the E.E.C. is freedom of movement. One fundamental rule underpins the new regime: that in the application of the Treaty there is to be an end to discrimination based on nationality.<sup>1</sup> However, the self-same article which prescribes this *règle de base* provides also that non-discrimination cannot be invoked where there are specific or particular rules which demand a different approach. In so far as the Treaty of Rome, in Articles 48 to 57, advances the cause of freedom of movement and the right of establishment, it also reserves to States Members the power to curtail those freedoms in the interest of *ordre public*, public safety and public health.<sup>2</sup> Directive 64/221 attempts to confine and structure these concepts, to which Member States may resort on occasion in order to justify the refusal of admission, the refusal of a residence permit, and the expulsion of an E.E.C. national.

##### (a) *The scope of the reserved powers under the Treaty of Rome*

It has been argued that the inclusion of these 'let-out' provisions represents a significant retention of sovereign powers and pure discretion.<sup>3</sup> But, as shown above, they are not unlimited. They are confined, indirectly by the aims and purposes of the European Communities, and directly by the express effect of Community law. Thus, Directive 64/221 provides, for example, that these exceptional powers may be exercised only on grounds which relate to the individual.<sup>4</sup> It is important to remember that the community worker has a legal right to a residence permit and that therefore the provisions of *ordre public* must operate by way of exception.<sup>5</sup> In a German case in 1962, it was held that the concept of *ordre public* was to be understood in the wide sense current in continental countries, and reference was made to the Protocol of the European Convention on Establishment. Nevertheless, the Court went on to declare that it had the power to examine the reasons advanced, to establish whether they met the requirements of *ordre public* as a matter of law.<sup>6</sup>

law guaranteed by Article 19 (4) of the Constitution applied in full to aliens. It also applied the principle of *Interessenabwägung* and, in favour of the appellants, noted how serious expulsion would be for a medical student very nearly at the end of his studies.

<sup>1</sup> Article 7. See Sundberg-Weitman, 'The Addressees of the Ban on Discrimination enshrined in Article 7 of the E.E.C. Treaty', *Common Market Law Review*, 10 (1973), p. 71.

<sup>2</sup> Articles 48 (3), 56 (1).

<sup>3</sup> Desmedt, 'La Police des étrangers', *Cahiers de droit européen*, 2 (1966), pp. 55, 56.

<sup>4</sup> Article 2 (2); general economic grounds are absolutely ruled out. The exceptional character of any departure from the rules concerning freedom of movement was emphasized by the European Court of Justice in *Bonsignore v. Oberstadtdirektor, Köln*, [1975] 1 C.M.L.R. 472.

<sup>5</sup> *Re Residence Permits*, [1966] C.M.L.R. 5, decision of the Berlin Verwaltungsgericht (1962).

<sup>6</sup> *Ibid.* Cf. *Re Expulsion of an Italian National*, [1965] C.M.L.R. 285.



There have been further developments since that date. For example, the European Court of Justice has held that the term 'Community worker' is a term of Community law:<sup>1</sup>

If this could arise from internal law, each State would then have the power to modify the concept of 'migrant worker' and to eliminate certain categories at will from the protection of the Treaty.

The same reasoning is equally applicable to the Treaty concept of *ordre public*.<sup>2</sup> In *City of Wiesbaden v. Barulli*, the court noted that since Directive 64/221 the legal bases of many earlier decisions had been altered, although even here a somewhat reserved approach was adopted.<sup>3</sup> The court felt that the definitions of that Directive were fairly narrow:<sup>4</sup>

... they do not create a particular concept of *ordre public* of paramount significance. Consequently one must proceed from the concept customary in the countries concerned and so consider the definitions as modifications ... Here we are dealing with inter-state and supra-national law.

The caution in this approach has been largely overtaken by events. For some time it had been argued that not only Regulations, but also Directives, might be so binding within the Community as to give rise to enforceable rights in favour of individuals.<sup>5</sup> The European Court of Justice took up this suggestion in a number of recent cases and in its judgments has favoured individual rights deriving both from directly applicable treaty provisions and from Directives—in the latter instance, even in the absence of national legislation.<sup>6</sup>

#### (b) *The decision in Reyners v. Belgian State*

In *Reyners v. Belgian State*<sup>7</sup> the question for decision by the Court was whether a Dutch national was entitled, under the E.E.C. Treaty regime of

<sup>1</sup> *Unger v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, [1964] C.M.L.R. 319, 331.

<sup>2</sup> But note *Re Expulsion of an Italian Worker*, [1965] C.M.L.R. 53, in which the OVG Münster concluded that the question whether an alien has violated *ordre public* falls to be decided by German law, whether the power of expulsion is exercised under Articles 48 (3) and 56 (1) of the Rome Treaty or under Article 2 (2) (ii) of the Treaty of Friendship between Germany and Italy. This latter provision declared that after a period of 'ordinary residence' of more than five years Italian nationals were only to be expelled from the Federal Republic on grounds of State security, or when the threat to public safety, order or morality is particularly grave. See also, *VerwRspr.* Bd. 20 S. 844, decision of the OVG Rheinland-Pfalz (1969) to similar effect. The court took note of Article 3 (2) of the Directive 64/221, which declares that conviction alone is not a sufficient ground for expulsion, but held that the authorities had not, in the circumstances, abused their discretion.

<sup>3</sup> [1968] C.M.L.R. 239, decision of the Landgericht, Wiesbaden.

<sup>4</sup> *Ibid.*, at p. 245. The court also referred to the freedom of people to move about, inquiring into or seeking work, as a privilege rather than a right: *ibid.*, p. 246, *sed quare*.

<sup>5</sup> See in particular, Bebr, 'Directly Applicable Provisions of Community Law: The Development of a Community Concept', *International and Comparative Law Quarterly*, 19 (1970), p. 257, especially at pp. 278, 289 et seq.; Lipstein, *The Law of the European Economic Community* (1974), pp. 11, 27 et seq.; *Corvelyn v. Etat Belge*, *Cahiers de droit européen*, 5 (1969), p. 343, *Re Deportation of a Belgian National*, [1974] 1 C.M.L.R. 107 (OVG, Münster, 1972).

<sup>6</sup> See also *Re French Merchant Seamen*, [1974] 2 C.M.L.R. 216; *Lütticke v. Hauptzollamt Sarrelouis*, [1971] C.M.L.R. 674.

<sup>7</sup> [1974] 2 C.M.L.R. 305.



establishment, to practise as *avocat* in Belgium. In its judgment, the European Court of Justice declared:<sup>1</sup>

[26] In laying down that freedom of establishment shall be attained at the end of the transitional period, Article 52 thus imposes an obligation to attain a precise result, the fulfilment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures.

[27] The fact that this progression had not been adhered to leaves the obligation itself intact beyond the end of the period provided for its fulfilment.

The consequence was that after the expiry of the transitional period the rule prohibiting discrimination on the ground of nationality was henceforth sanctioned by the Treaty itself, with *direct effect*.

(c) *The decision in Van Duyn v. Home Office*

The Court went a step further in *Van Duyn v. Home Office* (No. 2),<sup>2</sup> a decision given on a reference from the Chancery Division. The case arose out of the refusal of admission to the United Kingdom of a Dutch national whose intention was to take employment with a branch of the Church of Scientology. This organization, although not illegal, was considered by the British Government to engage in activities contrary to public policy. In view of this, it was government practice to refuse admission to any alien seeking entry to the United Kingdom for the purpose of participation in the organization. Before the Court, the Government argued that it had done no more than exercise the right reserved to it in Article 48 (3). It further argued that no Directive could have direct effect by reason of the limitations said to exist in Article 189 of the Treaty. It was the view of the Court, however, that Article 48 of the Treaty and Article 3 (1) of E.E.C. Directive 64/221 were both self-executing. In respect to Article 48, the Court noted:<sup>3</sup>

[6] These provisions impose on Member States a precise obligation which does not require the adoption of any further measure on the part either of the Community institutions or of the Member States and which leaves them, in relation to its implementation, no discretionary power.

It affirmed yet again that the exceptional right of derogation reserved to States in Article 48 (3) continued subject to judicial control, and that national courts must protect the individual rights conferred by the generality of that Article.<sup>4</sup> In respect to the question of the direct effect of a provision contained in a Directive, it was said:<sup>5</sup>

[12] . . . It would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if

<sup>1</sup> [1974] 2 C.M.L.R. 305, 327.

<sup>2</sup> [1975] 1 C.M.L.R. 1; [1975] 3 All E.R. 190; Simmonds, 'Van Duyn v. The Home Office: The Direct Effectiveness of Directives', *International and Comparative Law Quarterly*, 24 (1975), p. 419.

<sup>3</sup> Judgment of the Court, [1975] 1 C.M.L.R. 1, 14 at pp. 15-16.

<sup>4</sup> Ibid., para. 7.

<sup>5</sup> Ibid., p. 16.

individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of community law.

Finally, the Court set out in its judgment matters relevant to the personal conduct of the individual which might justifiably be taken into account in determining whether or not the exceptional right of derogation should be exercised.<sup>1</sup> Moreover, the Court appears expressly to have ignored the invitation extended to it in his submissions by Advocate General Mayras, which was, to restrict the concept of 'community public policy' (*ordre public*) to an *economic* public policy.<sup>2</sup>

In addition to the foregoing, it is also settled that repressive measures against individual E.E.C. nationals are not justified by reason only of their criminal conviction,<sup>3</sup> nor by the simple expiry of the individual's identity document.<sup>4</sup> Health reasons are specifically listed, and it is expressly provided that diseases or disabilities occurring after the initial residence permit has been issued do not justify either a refusal to renew such permit or an order of expulsion.<sup>5</sup> Furthermore, it has recently been held by the European Court that to expel an E.E.C. national 'pour encourager les autres', for general preventive reasons, is contrary to Community law.<sup>6</sup>

The manner of exercise of that discretionary power which remains to States Members is regulated by requirements as to procedural guarantees.<sup>7</sup> There must be available some form of appeal against, or review of, decisions to refuse admission, to refuse the issue or renewal of a residence permit, or to order expulsion.<sup>8</sup> The Directive declares that the Community national shall have the same possibilities of review as are available to the local citizen in respect of acts of the administration,<sup>9</sup> but in regard to deportation proceedings, the reference to national treatment is clearly inapplicable. National authorities have, in many cases, opted for the informal procedure of permitting representations before an advisory committee. It is open to debate whether such procedures fulfil States' obligations under the Treaty, particularly as the appointment and membership of the committees remains in the hands of State authorities.

<sup>1</sup> [1975] 1 C.M.L.R. para. 17 et seq.

<sup>2</sup> [1975] 1 C.M.L.R. 1, 11; compare the manifest change of view adopted by Advocate General Mayras in his submissions to the Court in *Bonsignore v. Oberstadtdirektor, Köln*, [1975] 1 C.M.L.R. 472, 475, 478-85 and *Rutili v. Minister of the Interior*, [1976] 1 C.M.L.R. 140, 143-52.

<sup>3</sup> Directive 64/221, Article 3 (2).

<sup>4</sup> *Ibid.*, Article 3 (3), (4).

<sup>5</sup> *Ibid.*, Article 4 and Annex. Cf. United Kingdom Immigration Act 1971, section 30; Mental Health Act 1959, section 90. For some early examples of agreements for the mutual retention of lunatics, see *British Digest of International Law*, vol. 6, pp. 103-6.

<sup>6</sup> *Bonsignore v. Oberstadtdirektor, Köln*, [1975] 1 C.M.L.R. 472; this decision was anticipated in *VerwRspr.* Bd. 25 S. 81 (VGH, Hesse, 1972).

<sup>7</sup> On the right to know the reasons for an adverse decision and the related right of appeal, see the judgment of the European Court of Justice in *Rutili v. Minister of the Interior*, [1976] 1 C.M.L.R. 140, 153 et seq., paras. 16-21, 33-9.

<sup>8</sup> Directive 64/221, Articles 8, 9. Cf. France, décret no. 70-29 du 5 janvier 1970 (D. 1970. 54), Article 11. Note the decision of the Conseil d'État, 11 décembre 1970, in which an expulsion order was struck down because the alien had not been granted the procedural guarantees provided for by the Franco-German Treaty of Establishment 1956: *Clunet*, 1971, p. 296, note Goldman; *Revue critique de droit international privé*, 1972, p. 61, note Aymond.

<sup>9</sup> Directive 64/221, Article 8.

*(d) Conclusions regarding the E.E.C. regime*

The E.E.C. Treaty has created its own legal order, which is directly applicable both to Member States and to their nationals as a result of the partial transfer of sovereignty from those States to the Community.<sup>1</sup> Part of this Community law is comprised in the concept of *ordre public*. To define this notion as a reserved element of 'sovereign rights' is to assume for Member States a way out of their obligations. The aims and purposes of the E.E.C. touch social, economic and legal relationships in a manner beyond the countenance of most bilateral treaties of commerce and friendship, and beyond even the provisions of the European Convention on Establishment. International standards as hitherto applied are still relevant, but they have been overtaken by a substantive law which is supra-national. Within the sphere of application of the Treaties, the legality of action taken in the name of *ordre public* stands to be determined by impartial decision. Otherwise, and this was made clear in the *Guardianship of Infants* case, the notion of *ordre public* would remain within the 'orbit of uncertainty, pure discretion and arbitrariness'.<sup>2</sup>

Article 7 of the Treaty of Rome proposes the general rule of no discrimination on the basis of nationality. Logically, therefore, the nationals of Member States should be subject to a general regime of *ordre public* and not to those particular regimes which individual States may oppose to aliens *qua* aliens. The power to exclude or to expel is exceptional; the basis of the principle of free movement itself is the control of discretion. From these premisses it follows that the individual faced with the prospect of repressive measures is entitled to an effective judicial guarantee. Such guarantee in turn must be capable of recognizing those substantive rights with which the Community national is endowed. It is open to serious debate whether 'expulsion' itself is an acceptable sanction in a community which is based on national treatment and supra-national co-operation. It has been said that the principle of non-discrimination on the basis of nationality reaches beyond the establishment of the Community, and that it must not be ignored in its establishment.<sup>3</sup> Taking that as a starting-point, one may then go on to the specific question whether there is a presumption in favour of 'sovereign' powers, or a presumption in favour of Community law, in which every derogation is exceptional and must be justified. Within the E.E.C., it must be the latter presumption which is dominant. The regime benefits from the existence of machinery for the resolution of disputes, and when the question of measures purportedly taken for reasons of *ordre public* comes before the European Court of Justice, that Court finds itself dealing with but another concept of Community law. In *Rutili v. Minister of the Interior* the Court declared:<sup>4</sup>

... the concept of public policy must, in the Community context and where, in particular, it is used as a justification for derogating from the fundamental principles of

<sup>1</sup> *Costa v. E.N.E.L.*, [1964] C.M.L.R. 425.

<sup>2</sup> *I.C.J. Reports*, 1958, *per* Judge Lauterpacht at pp. 55, 100.

<sup>3</sup> Submission of Advocate General Lagrange in *Re Electric Refrigerators*, [1963] C.M.L.R., at p. 294.

<sup>4</sup> [1976] 1 C.M.L.R. 140, 155 (para. 27); see also *ibid.*, p. 157 (para. 51); Goodwin-Gill, 'Ordre public and the limits to discretionary power', *Law Quarterly Review*, 92 (1976), pp. 353-7.



equality of treatment and freedom of movement for workers, be interpreted strictly, so that its scope cannot be determined unilaterally by each member-State without being subject to control by the institutions of the Community.

Thus, in order to ascertain the substance of this concept, the Court will look to the aims and purposes of the Treaty of Rome and, in particular, the content of Directive 64/221. It must apply the appropriate objective standards, bearing in mind the principle that *ordre public* does not represent an area of pure discretion, permitting the avoidance of treaty obligations. Member States still retain a margin of appreciation, but their freedom of decision is now more closely confined. In determining the weight to be given to their own interests, they must now pay due regard not only to the interests and rights of the individual, but also to the interests of the Community as a whole. *Ordre public* is no longer a concept to be determined solely in accordance with national criteria.

## VI. SUMMARY OF THE LIMITS ON THE POWER OF EXPULSION IN GENERAL INTERNATIONAL LAW

An analysis of expulsion in the practice of States reveals that general international law is by no means silent as to the limits within which this power may be exercised. For it is a power which is essentially discretionary, and international law operates to prescribe the extent of the power, and to regulate its manner of exercise. It is possible to go farther now in the description of those limits than the somewhat generalized conclusions most usually found, for example, to the effect that the power of expulsion must not be exercised 'arbitrarily', or 'unjustly', or 'without consideration'. It remains essential that any description of the power of expulsion in practice should take account of the legal context in which it finds its meaning. Expulsion serves as a measure to terminate the relationship of reciprocal rights and duties which is established between receiving and protecting States, by reason of the admission or presence of foreign nationals on the territory of the former. But if, in terminating that relationship, any of the obligations which it owes are violated by the expelling State, then international responsibility is invoked and a new set of legal relationships is established. It may also be necessary and advisable to take account of that putative theory of responsibility, which would embrace obligations owed *erga omnes*, or owed to some other subject of international law. The obligations concerning basic human rights and the principle of non-discrimination have been canvassed as falling within this class.

With this fundamental legal relationship between States as the point of departure, the role and limits of the discretionary power of expulsion may then be summarized:

1. The function of expulsion is to protect the essential interests of the State and to preserve *ordre public*.
2. From its function, it follows that the power of expulsion must not be 'abused'. If its aim and purpose are to be fulfilled, the power must be exercised

in good faith and not for some ulterior motive, such as genocide, confiscation of property, the surrender of an individual to persecution, or as an unlawful reprisal.<sup>1</sup>

3. The function of expulsion, together with the requirement of good faith, involves the subsidiary point that expulsion requires 'justification'. The expelling State must show 'reasonable cause', although in determining whether its interests are adversely affected, or whether there is a threat to *ordre public*, international law allows that State a fairly wide margin of appreciation. However, *ordre public* is a general legal conception, the content of which is determined by law.

4. The principle of good faith and the requirement of justification demand that due consideration be given to the interests of the individual, including his basic human rights, his personal interests, including family and other connections with the State of residence, his property interests and other legitimate expectations. These require to be weighed against the competing demands of *ordre public*.

5. General international law imposes as a precondition to the validity of an order of expulsion the requirement that it be made in accordance with law. This rule entails the further requirement that there should be available an effective remedy whereby an unlawful exercise of discretion may be challenged.

6. The expulsion itself must be carried out in accordance with the general standards which international law has established for the treatment of aliens. Due regard must, therefore, be paid to the dignity of the individual and to his basic rights as a human being.

Each of the above propositions indicates significant limitations upon the discretionary power to expel aliens. Considered in summary form, these limitations and the standards which they propose may appear too general; however, the manner of their more precise application has been sufficiently indicated above. The emphasis on control of discretion and on the permissible limits of its exercise is commonly found in municipal law and, to that extent, may support the finding of a general principle. Municipal law accepts that, whether it be a civil or a criminal proceeding, deportation is a severe penalty which must be founded on serious reasons. In the systems examined, limited in number though they have been, there is recognition also of the requirement of a hearing as a necessary pre-condition to the making or execution of an order of expulsion. Some States will permit an appeal on the merits, while others simply allow the alien to put forward representations. But in every case it is open to the alien to challenge the legality of the measure, and to require that the law control not only formal illegality, but also the arbitrary or abusive exercise of power. Once again, the emphasis is on the inherently discretionary nature of the 'right' of expulsion. However, it may be noted that, while the standards of international law favour a system of appeals, it is recognized that exceptions may be made in 'security'

<sup>1</sup> There are difficulties in determining when a reprisal is lawful. Brownlie observes that, in principle, it should be a reaction to a prior breach of legal duty and be proportionate: *Principles of Public International Law* (2nd ed., 1973), p. 52.

cases. State practice indicates a possibly equivocal attitude to the exercise of power by others on such occasions, and this is some evidence of a claim to an absolute discretion in political or security matters. Nevertheless, there does not appear to be any objection in principle to the introduction of guiding rules even in this area; the requirement of good faith certainly stands already at the perimeter of the field of competence.

The rules and standards proposed receive additional support from the provisions of treaties. These do not only reflect the controls on discretion imposed by general international law, but also seek to define these controls with greater precision in the light of the express aims and purposes of the particular treaty. It may be that the most effective confinement of the discretionary power of expulsion can be achieved by way of the regional treaty-based organization such as the E.E.C. Here, in matters of entry and expulsion, the concern is with the development of Community law, as similarly, under the European Convention on Human Rights, the concern is with the concept of a European *ordre public*. It has been suggested also that the measure of expulsion may well be incompatible with the development of a political, economic and legal community. Expulsion is essentially a measure of self-defence, to be applied in the interests of the community as a whole. In many cases the local law will be adequate to cover criminal infractions, and it is debatable to what extent the discriminatory provision of expulsion is additionally justifiable. The power of expulsion is a sovereign right, in that it pertains to every State for that State's protection, but it is a power which is controlled and limited, particularly by treaty obligations, and generally by the obligations imposed by customary international law.



# THE APPLICATION OF ARTICLE 6 (1) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS TO ADMINISTRATIVE LAW\*

*By* D. J. HARRIS<sup>1</sup>

## I. INTRODUCTION

SOME of the more perplexing problems in the interpretation of Article 6 (1) of the European Convention on Human Rights concern its application in non-criminal cases. According to the English text, it applies not only 'in the determination . . . of any criminal charge' against a person, but also 'in the determination of his civil rights and obligations'.<sup>2</sup> The questions then are: what are a person's 'civil rights and obligations' in this context and when are they subject to 'determination'?

It seems clear that cases between private litigants in contract, tort, etc. before the ordinary courts are covered. But what else? In particular, does Article 6 (1) apply to administrative law? Does it apply, that is, to cases of government liability in contract and tort and to disputes between the individual and the State concerning such matters as the compulsory purchase of property, planning permission, taxation, social security and immigration? Does it control (1) the functioning of administrative or other special courts or tribunals; (2) decision-making by government officials; (3) in some legal systems, judicial review by the ordinary courts of decisions taken by such courts or tribunals and by such officials? These are important questions because it is in the area of administrative law that the right to a fair hearing is most in need of protection

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<sup>2</sup> The complete English text of Article 6 (1) reads: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

The equally authentic French text of Article 6 (1) reads: 'Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle. Le jugement doit être rendu publiquement, mais l'accès de la salle d'audience peut être interdit à la presse et au public pendant la totalité ou une partie du procès dans l'intérêt de la moralité, de l'ordre public ou de la sécurité nationale dans une société démocratique, lorsque les intérêts des mineurs ou la protection de la vie privée des parties au procès l'exigent, ou dans la mesure jugée strictement nécessaire par le tribunal, lorsque dans des circonstances spéciales la publicité serait de nature à porter atteinte aux intérêts de la justice.'

The remainder of Article 6 is concerned only with criminal cases.

and because Article 6 (1) is the only provision in the Convention that can conceivably offer it.

By 1971, the European Commission of Human Rights had developed an extensive jurisprudence in which it had held that 'civil rights and obligations' in Article 6 (1) meant private law rights and obligations (or duties): public law rights and obligations were excluded.<sup>1</sup> As a result of this, determinations of rights and obligations in administrative law by any court or tribunal or other body or person fell outside the protection of Article 6 (1). Moreover, most proceedings before administrative and other special courts or tribunals and all decision-making by the executive,<sup>2</sup> as well as judicial review by the ordinary courts of both kinds of activities, were excluded. The European Court of Human Rights considered the matter for the first time in any detail in the *Ringeisen* case.<sup>3</sup> In its judgment in that case, the Court confirmed much of the Commission's approach but disagreed with it in one important respect; whereas it accepted the Commission's reading of 'civil rights and obligations', the Court interpreted the word 'determination' in Article 6 (1) in such a way as to bring some administrative law cases, including the proceedings in issue in the *Ringeisen* case itself, within that Article. Clearly, therefore, the *Ringeisen* case is an important landmark. For this reason it is proposed to examine the application of Article 6 (1) to administrative law in the light of it.<sup>4</sup>

<sup>1</sup> But see, exceptionally, the *Alam and Khan* line of cases, below pp. 167 et seq.

<sup>2</sup> The exclusion of 'all' decision-making by the executive (even that to do with private law rights and obligations) follows from A. 1329/62, as to which, see below, p. 188.

<sup>3</sup> *European Court of Human Rights, Ringeisen* case, judgment of 16 July 1971 (referred to hereafter as *Ringeisen* case, *Judgment*). French text of the judgment authentic. The case was decided by the following chamber of the Court: Rolin, president; Holmbäck, Verdross, Wold, Zekia, Favre and Sigurjonsson, judges.

<sup>4</sup> For discussion of this question before the *Ringeisen* case was decided by the Court, see Antonopoulos, *La jurisprudence des organes de la Convention européenne des droits de l'homme* (1967), pp. 126-9; Buergenthal, 'Comparative Study of Certain Due Process Requirements of the European Human Rights Convention', *Buffalo Law Review*, 16 (1966), p. 18 at pp. 44-52 (hereafter referred to as *Buergenthal I*); Buergenthal, 'Comparison of the Jurisprudence of National Courts with that of the Organs of the Convention as regards the Rights of the Individual in Court Proceedings', in Robertson (ed.), *Human Rights in National and International Law* (1968), p. 151, at pp. 175-6, 188-9; Buergenthal and Kenewig, 'Zum Begriff der "Civil Rights" in Artikel 6 Absatz 1 der Europäischen Menschenrechtskonvention', *Archiv des Völkerrechts*, 13 (1967), p. 393; Echthölter, 'Die Europäische Menschenrechtskonvention in der juristischen Praxis', *Juristenzeitung* (1956), p. 142 at p. 145; Eissen, 'Le "Droit à tribunal" dans la jurisprudence de la Commission', *Miscellanea Van Der Meersch*, vol. 1 (1972), p. 455; Fawcett, *The Application of the European Convention on Human Rights* (1969), pp. 125-31; Geck, 'Anmerkung zum Bescheid des OVG Münster vom 24. 6. 1955', *Deutsches Verwaltungsblatt*, 1956, p. 524; Golsong, 'International Treaty Provisions on the Protection of the Individual against the Executive by Domestic Courts', in Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, *Judicial Protection against the Executive*, vol. 3 (1971), p. 245 (English edition); Grementieri, 'La Convention européenne des droits de l'homme et le procès civil', *Revue trimestrielle de droit Européen*, 5 (1969), p. 463; Guradze, *Die Europäische Menschenrechtskonvention* (1968), pp. 90-3; Jaenicke, 'Judicial Protection of the Individual within the System of International Law', in Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, *Judicial Protection against the Executive*, vol. 3 (1971), p. 281 (English edition); Khol, 'The Influence of the Human Rights Convention on Austrian Law', *American Journal of Comparative Law*, 18 (1970), p. 237; Mast, 'Artikel 6 (1) van de Europese Conventie voor de Rechten van de Mens en de Betekenis van het Begrip "Burgerlijke Rechten en Verplichtingen" alsmede van Bepaalde door dat Artikel Opgelegde Vormen', in Institut d'études européennes, Université libre de Bruxelles, *European*



II. THE *RINGEISEN* CASE

The facts of the *Ringeisen* case, so far as they are relevant here, were that on 6 February 1962 the applicant, an Austrian national, had made a contract with a Mr. and Mrs. Roth for the purchase from them of land in the Austrian province of Upper Austria. In accordance with an Upper Austrian statute, the transaction needed the approval of a public authority—the Eferding District Real Property Transactions Commission (*Bezirksgrundverkehrskommission*)—because the land was agricultural. The Commission was composed of a judge (the chairman) and four other members appointed by the local authority (one member), the District Governor (one member), and ‘an agricultural board which, under Austrian legislation, has a certain kind of self-government’ (two members).<sup>1</sup> On 28 September 1962, the Commission refused to approve the transaction on the statutory ground that the land was going to be used by the applicant for speculative building. As a result, the transaction was, in accordance with the statute, null and void. The applicant appealed, as the statute allowed, to the Linz Regional Real Property Transactions Commission (*Landesgrundverkehrskommission*). This body was presided over by a judge and consisted of ‘civil servants and representatives of interested bodies’,<sup>2</sup> including representatives of agricultural, commercial, industrial and residential groups. The members were appointed for five years and ‘shall not be bound by any instructions in the exercise of their duties and their decisions shall not be subject to repeal or alteration

*Criminal Law* (1970), p. 111; Morisson, *The Developing Law of Human Rights* (1967), p. 106; Morvay, ‘Rechtsprechung nationaler Gerichte zur Europäischen Konvention zum Schutze des Menschenrechte und Grundfreiheiten, etc.’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 21 (1961), p. 316; Newman, ‘Natural Justice, Due Process and the New International Covenants on Human Rights: Prospectus’, *Public Law* (1967), p. 274 at pp. 293–311; Pahr, ‘Die Staatenimmunität und Artikel 6, Absatz 1, der Europäischen Menschenrechtskonvention’, in *Mélanges Modinos* (1968), p. 222; Partsch, *Die Rechte und Freiheiten der Europäischen Menschenrechtskonvention* (1966), pp. 141–8; Rasenack, ‘“Civil Rights” or “Droits et obligations de caractère civil”, etc.’, *Human Rights Journal*, 3 (1970), p. 51; Raymond, ‘Les Droits garantis par la Convention de sauvegarde des droits de l’homme et des libertés fondamentales’, *Human Rights Journal*, 3 (1970), p. 289 at pp. 301–2; Robertson, ‘The United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights’, this *Year Book*, 43 (1968–9), p. 21 at p. 32; Schäffer, ‘Der Zivilrechtsbegriff der Menschenrechtskonvention’, *Österreichische Juristen-Zeitung*, 20 (1965), p. 511; Scheuner, ‘An Investigation of the influence of the European Convention on Human Rights and Fundamental Freedoms on National Legislation and Practice’, in Eide and Schou (ed.), *International Protection of Human Rights* (1968), p. 192 at pp. 201–2; Schorn, *Die Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten und ihr Zusatzprotokoll in Einwirkung auf das Deutsche Recht* (1966), pp. 180–6; Schwelb, ‘On the Operation of the European Convention on Human Rights’, *International Organisation*, 18 (1964), p. 558 at pp. 574–6; Stryckmans, ‘La Commission européenne des droits de l’homme et le procès équitable’, *Journal des Tribunaux*, 81 (1966), p. 533 at pp. 540–1; Wiebringhaus, *Die Rom-Konvention für Menschenrechte in der Praxis der Strassburger Menschenrechtskommission* (1959), pp. 81–4; Van der Meersch, *Organisations européennes*, vol. 1 (1966), pp. 271–2; Vasak, *La Convention européenne des droits de l’homme* (1964), pp. 38–41; Velu, ‘Le problème de l’application aux juridictions administratives, des règles de la Convention européenne des droits de l’homme relative à la publicité des audiences et des jugements’, *Revue de droit internationale et de droit comparé*, 38 (1961), p. 129; Velu, ‘Article 6 of the European Convention on Human Rights in Belgian Law’, *American Journal of Comparative Law*, 18 (1970), p. 259.

<sup>1</sup> *Ringeisen* case, *Pleadings*, p. 232 (statement by the Commission).

<sup>2</sup> *Ringeisen* case, *Judgment*, p. 40.



by the administration'.<sup>1</sup> Meeting in private, on 13 May 1963, it rejected the applicant's appeal. The applicant then challenged the Regional Commission's decision before the Austrian Constitutional Court, *inter alia* on the ground that the Commission had not been constituted according to law because two of its members who had participated when the decision of the Regional Commission was taken had not been present earlier when the Commission had heard argument in the appeal. On 20 June 1964, the Constitutional Court upheld the applicant's challenge on this ground in accordance with Austrian law and sent the case back to the Regional Commission for it to rehear the appeal. This the Commission did, once more in private, and on 3 February 1965 rejected it again. The applicant appealed to the Constitutional Court a second time, claiming bias on the part of six members of the Regional Commission. On 27 September 1965, his appeal was dismissed because under Austrian law 'the question of bias had no bearing on the competence of the Regional Commission which was the only question submitted to it for the Constitutional Court's supervision'.<sup>2</sup> The Constitutional Court did not consider the allegation of bias on its merits.

In his application to Strasbourg,<sup>3</sup> submitted on 3 July 1965, the applicant alleged, *inter alia*, that Article 6 (1) of the Convention had been violated in the course of the proceedings in which approval of the sale had been refused.<sup>4</sup> On 18 July 1968, the Commission admitted the application for consideration, *inter alia*, of the merits of that allegation. In its report on the case, adopted on 19 March 1970, the Commission was of the opinion, by 7 to 5, that Article 6 (1) did not apply to the proceedings in question because 'civil rights and obligations' were not being determined in them.<sup>5</sup> As a result, the Commission did not rule upon the merits of the applicant's claim under Article 6 (1) concerning his property transaction. The case was referred to the Court by the Commission. On 16 July 1971,<sup>6</sup> the Court held unanimously that there had been no violation of Article 6 (1). It found that the Regional Commission, which had taken the final decision on the merits of the case, was a 'tribunal' within the meaning of Article 6 (1) because 'it is independent of the executive and also of the parties, its members are appointed for a term of five years and the proceedings before it afford the necessary guarantees'.<sup>7</sup> It rejected the applicant's allegation of bias on the part of six members of the Commission contrary to the requirement in Article 6 (1) of trial by an 'impartial' tribunal. Lastly, it found that the requirement that proceedings be public did not apply; the proceedings before the Regional Commission fell within the Austrian reservation to the Convention<sup>8</sup> on this point.

<sup>1</sup> Upper Austrian statute quoted in the *Ringeisen* case, *Judgment*, p. 9.

<sup>2</sup> *Ibid.*, p. 39.

<sup>3</sup> A.2614/65, *Yearbook of the European Convention on Human Rights (Y.B.E.C.H.R.)*, 11 (1968), p. 268 (final decision as to admissibility).

<sup>4</sup> For details of the applicant's complaints, see *Y.B.E.C.H.R.*, 11 (1968), pp. 288, 316.

<sup>5</sup> *Ringeisen* case, *Pleadings*, p. 10 et seq.

<sup>6</sup> The case took just under 6 years from lodging of the application to the ruling by the Court on the merits—a very long time.

<sup>7</sup> *Ringeisen* case, *Judgment*, p. 39.

<sup>8</sup> *Y.B.E.C.H.R.*, 2 (1958-9), p. 882.

But the first question which the Court considered—which is the one to which the remainder of this article is devoted—was whether Article 6 (1) applied to the case at all. Since there had been no ‘criminal charge’ against the applicant, the question was whether the Regional Commission had been engaged in determining his ‘civil rights and obligations’. In a unanimous judgment, the Court ruled that it had, so that Article 6 (1) applied. The relevant passage from the Court’s judgment reads as follows:

For Article 6, paragraph (1) to be applicable to a case (‘contestation’) it is not necessary that both parties to the proceedings should be private persons, which is the view of the majority of the Commission and of the Government. The wording of Article 6, paragraph (1), is far wider; the French expression ‘contestations sur (des) droits et obligations de caractère civil’ covers all proceedings the result of which is decisive for private rights and obligations. The English text ‘determination of . . . civil rights and obligations’, confirms this interpretation.

The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence.

In the present case, when Ringeisen purchased property from the Roth couple, he had a right to have the contract for sale which they had made with him approved if he fulfilled, as he claimed to do, the conditions laid down in the Act. Although it was applying rules of administrative law, the Regional Commission’s decision was to be decisive for the relations in civil law (‘de caractère civil’) between Ringeisen and the Roth couple. This is enough to make it necessary for the Court to decide whether or not the proceedings in this case complied with the requirements of Article 6, paragraph (1), of the Convention.<sup>1</sup>

### III. THE MEANING OF ‘CIVIL RIGHTS AND OBLIGATIONS’

#### (i) *A ‘substantive’ meaning*

The first point that emerges from this passage is that the phrase ‘civil rights and obligations’ was understood by the Court as having what might be called a ‘substantive’, as opposed to a ‘forum’, meaning. The latter possibility arises largely from the fact that it would be plausible to interpret ‘civil rights and obligations’ as referring to all rights and obligations that happen to be determinable at a particular time in a given legal system in a civil court, by which would probably be meant an ordinary court other than a criminal court. The Court has rejected this ‘forum’ approach. A right or obligation is to be classified for the purposes of Article 6 (1) by reference to its nature, or substance, and not the court or tribunal or other body or person by which or by whom it is determined. Thus, in the *Ringeisen* case the question was not, ‘Are rights and obligations determined before a body such as the Regional Commission subject to Article 6 (1)?’, but ‘Are the rights and obligations of the private parties to a contract for the sale of land in themselves “civil rights and obligations”?’

<sup>1</sup> *Ringeisen* case, *Judgment*, p. 39.

There is no statement precisely to this effect;<sup>1</sup> but the principle is implicit in the Court's treatment, in the final paragraph of the extract quoted above, of the applicant's right under the contract of sale as a 'civil right'.

The Court thus confirmed the view of the Commission which, as early as 1962, had preferred a 'substantive' to a 'forum' interpretation. In *Isop v. Austria*<sup>2</sup> the applicant had brought private criminal proceedings under the Austrian Criminal Code against another private person for defamation. In his application he argued that Article 6 had been violated in the course of these proceedings. Clearly there was no criminal charge *against* the applicant. It became necessary therefore to decide whether his 'civil rights' were in issue in the case. The Commission held that they were. It did not matter that under Austrian law the case was determinable in a criminal court:

. . . the question whether a right or obligation is of a civil nature within Article 6, paragraph (1) of the Convention does not depend upon the particular procedure prescribed by domestic law for its determination but solely on an appreciation of the claim itself and of the purpose of the complaint . . .<sup>3</sup>

Applying this text to the facts of the case, the Commission found that the applicant's purpose in bringing the case was 'by the means given to him by Austrian law to seek the rehabilitation of his honour' and that 'the right to enjoy a good reputation and the right to have determined before a tribunal the justification of attacks upon such reputation must be considered civil rights' in the sense of Article 6.<sup>4</sup>

Another aspect of Article 6 (1) illustrated by the facts of *Isop v. Austria*, which may be noted at this point, is that the Convention does not seek to say what 'civil rights and obligations' should exist in the law of the contracting parties. This is left to the contracting parties; Article 6 (1) is concerned only to establish that a certain standard of procedural justice, required of all of the contracting parties in common, is met in the determination of such rights and obligations as happen to exist.<sup>5</sup> In *Isop v. Austria* the rights identified by the

<sup>1</sup> As to the significance of the second paragraph of the extract from the Court's judgment quoted above, see below, p. 180.

<sup>2</sup> A.808/60, *Y.B.E.C.H.R.*, 5 (1962), p. 108. The decision in this case was followed in A.2145/64, *ibid.*, 8 (1965), p. 282, and A.4523/70, *Collection of Decisions of the European Commission of Human Rights (C.D.E.C.H.R.)*, 38 (1971), p. 115. See to the contrary (i.e. adopting a 'forum' approach by which Article 6 would apply to such proceedings as in fact occur before the ordinary courts) the decision of 25 November 1955 of the Administrative Court of Appeal of Münster, *Neue juristische Wochenschrift* (1956), p. 1374; *Y.B.E.C.H.R.*, 2 (1958/9), p. 572. The decision has been adversely criticized in much West German doctrine: see, e.g., Golsong, *loc. cit.* (above, p. 158 n. 4), at p. 248. It would seem to have been influenced by a misleading German translation of the authentic English and French texts. There are, however, other early West German decisions to the same effect: see *Buergenthal I* (above, p. 158 n. 4), at p. 48.

<sup>3</sup> *Y.B.E.C.H.R.*, 5 (1962), p. 122.

<sup>4</sup> *Ibid.* The case was decided before the Commission's private law interpretation of 'civil rights and obligations' was made explicit. *Quaere* whether 'the right to have determined before a tribunal the justification of attacks upon such reputation' is a private law right. A separate question is whether the *defendant* in the case would have been entitled to have relied upon the guarantees in Article 6 (1) (2) (3) provided for persons subject to a 'criminal' charge. It would be unsatisfactory in view of the social and personal, as well as legal, consequences of conviction for what is locally classified as a criminal offence if he were not.

<sup>5</sup> Cf. *Buergenthal I* (above, p. 158 n. 4), p. 46, and Jaenicke, *loc. cit.* (above, p. 158 n. 4),



Commission were ones that the applicant actually had, however they were classified, in Austrian law. The remainder of the Commission's jurisprudence is consistent with this approach. So also is the judgment in the *Ringeisen* case, in which the Court argued, in the passage quoted above,<sup>1</sup> in terms of the right of the applicant under Austrian law.

By adopting a 'substantive' approach to the meaning of 'civil rights and obligations', the Court has avoided the weakness inherent in the 'forum' approach, viz. that of inequality in the obligations of the contracting parties. Under the latter, the extent of a State's obligations depends upon its unilateral decision to keep decision-making in this or that area of law within the executive or to place it in the hands, to a greater or lesser extent, of an independent body.<sup>2</sup> With such an approach, the more a contracting party took the trouble to introduce judicial procedures, the more it would subject itself to the scrutiny of the Strasbourg authorities.

(ii) *A 'private law' meaning*

(a) *The Court's adoption of this meaning.* Whether a 'substantive' approach is in fact a great improvement upon this situation turns, however, in part upon the width of the 'substantive' definition of 'civil rights and obligations' adopted. What emerges from the passage in the Court's judgment quoted above is that, as noted earlier, the word 'civil' in the phrase 'civil rights and obligations' (*droits et obligations de caractère civil* in the French text) was taken by the Court as referring to the distinction between private and public law. This, of course, is a distinction which is fundamental to civil law systems. Briefly, it is the distinction between the law governing the relations of private persons *inter se* and the law affecting the State.<sup>3</sup> Following this distinction, rights and obligations under public law are, as such, excluded from the protection of Article 6 (1). In particular, constitutional and administrative law rights and obligations are not protected. Criminal law, the third main branch of public law, is in a special position. Decisions taken in the 'determination of . . . any criminal charge' are expressly covered by a separate part of the wording of Article 6. Ancillary decisions relating to criminal proceedings not within this wording are not included. They are excluded because of the distinction between private

pp. 312-13. This does not mean that an applicant actually has to have a right in the law of the contracting party concerned for Article 6 (1) to apply. He does not, that is, have to win, or to show that he would have won, his case. It is without doubt sufficient that he has an arguable case. More difficult is the situation where he has virtually no chance of a decision in his favour because of the law or the facts of the case. As far as the law is concerned, it may be that the applicant's claim is statute-barred, that he makes a claim inconsistent with well-established precedent, or that the 'right' he claims is only a licence and clearly so. The question whether the applicant has to show at least an arguable case is one that may be resolved in the *Golder* case, *Y.B.E.C.H.R.*, 14 (1971), p. 417, which was pending before the Court at the time of writing. Note that although the above comments are expressed in terms of rights, they apply *mutatis mutandis* to obligations.

<sup>1</sup> p. 7.

<sup>2</sup> Cf. the sources cited at p. 174 n. 5 below.

<sup>3</sup> See Cohn, *Manual of German Law*, vol. 1, 2nd edn. (1968), paras. 10-15; David, *French Law* (translated by Kindred) (1972), part V; Merryman, *The Civil Law Tradition* (1969), ch. XIV; Schlesinger, *Comparative Law*, 3rd edn. (1970), pp. 243-4. This explanation of the distinction begs a number of questions (see further, below, pp. 183-4), but will suffice for the present purpose.

law and public law and also, as the Court has preferred to emphasize, because if certain decisions in criminal proceedings are specifically covered by Article 6, others, by inference, are not. This was the basis for the Court's decision in the *Neumeister* case.<sup>1</sup> There the Court ruled that the right of a person accused of a criminal offence to release on bail pending trial contained in Article 5 (3) of the Convention was not a 'civil right' for the purposes of Article 6 (1).<sup>2</sup> Its ruling centred upon the particular place of criminal proceedings in Article 6:

. . . remedies relating to detention on remand undoubtedly belong to the realm of criminal law and . . . the text of the provision invoked [Article 6 (1)] expressly limits the requirement of a fair hearing to the *determination . . . of any criminal charge*, to which notion the remedies in question are obviously unrelated.<sup>3</sup>

In contrast, all private law rights and obligations are 'civil rights and obligations'. Cases between private persons concerning their rights and obligations *inter se* in the law of contract, tort, property, succession, domestic relations, etc.,<sup>4</sup> are therefore covered by Article 6 (1). This includes rights and obligations in commercial law. Although continental legal theory distinguishes between commercial law (*droit commercial, handelsrecht*) and civil law (*droit civil, burgerliches Recht*), the latter being the law concerning private persons in their relations *inter se* other than in a commercial context, both are parts of private, not public, law. Article 6 refers, of course, to 'civil rights and obligations' ('*droits et obligations de caractère civil*'). The Court would appear to have understood the term 'civil' in this phrase in a wide sense as referring to the whole field of private law and not as distinguishing civil law from commercial law. Its judgment reads: 'The wording of Article 6, paragraph (1) . . . covers all proceedings the result of which is decisive for *private* rights and obligations.'<sup>5</sup>

(b) *Confirmation of the Commission's interpretation.* In adopting a private law version of 'civil rights and obligations', the Court confirmed an interpretation of Article 6 (1) long maintained by the Commission. The following passage from the latter's decision as to admissibility in A. 3134/67, etc., is a good statement of the Commission's view:

Whereas, as regards a prisoner's obligations and rights against the State in respect of the work which he is required to do during his detention, it is clear that this is a matter falling under public law and not under private law even if the system of payment for the applicant's work has had repercussions on his financial situation; whereas the proceedings in question concerned both a duty imposed on the applicant by public

<sup>1</sup> *European Court of Human Rights, Neumeister case*, Judgment of 27 June 1968 (referred to hereafter as *Neumeister case, Judgment*).

<sup>2</sup> See further, below, pp. 170-2.

<sup>3</sup> *Neumeister case, Judgment*, p. 43.

<sup>4</sup> e.g. copyright and patent law are parts of private law, at least in French and German law: see David, *op. cit.* (above, p. 163 n. 3), and Cohn, *op. cit.* (above, p. 163 n. 3).

<sup>5</sup> This is taken from the extract quoted at p. 161 above. Italics added. The French text of the Court's judgment at the same point refers to '*droits et obligations de caractère privé*' (italics added). The later reference by the Court (see the extract quoted above, p. 161) to 'the relations in *civil* law ("de caractère civil") between Ringeisen and the Roth couple' ('les rapports de caractère *civil*' in the French text (italics added)) is probably best regarded either as not being significant or as reflecting the civil (in the view of the Court), as opposed to the commercial, law character of the contract between Ringeisen and Mr. and Mrs. Roth.



authorities in the exercise of their powers under public law and any rights of the applicant arising out of that same relationship.

Whereas it follows that the proceedings were not concerned with the determination of the applicant's 'civil rights or obligations' and therefore fall outside the competence of the Commission *ratione materiae*.<sup>1</sup>

As this extract indicates, in A.3134/67, etc., the Commission rejected a claim regarding the payment of prisoners for work done in prison.<sup>2</sup> Following the same private law reading of 'civil rights and obligations', either expressly or impliedly,<sup>3</sup> it has rejected claims concerning decisions on the following matters:<sup>4</sup>

- the application of tax laws<sup>5</sup>
- the application of social security laws<sup>6</sup>
- legal aid in civil cases<sup>7</sup>
- the distribution by the State of the assets of a dissolved club<sup>8</sup>
- employment in the civil service (*la fonction publique*)<sup>9</sup> and in the armed forces<sup>10</sup>
- the inscription of a criminal conviction on a person's 'strafregister'<sup>11</sup>
- the right to practise law<sup>12</sup>

<sup>1</sup> *Y.B.E.C.H.R.*, 11 (1968), p. 528, at p. 562.

<sup>2</sup> A.3134/67, etc., was followed on this point in A.4984/71, *C.D.E.C.H.R.*, 43 (1972), p. 28.

<sup>3</sup> It was not until 1965, in A.2145/65, *Y.B.E.C.H.R.*, 8 (1965), p. 282, that the Commission expressly made use of its private law–public law distinction. Its earlier jurisprudence is, with one possible exception (see *Isop v. Austria*, p. 162 n. 2 above), consistent with it and can best be explained in terms of it.

<sup>4</sup> Note that most of the decisions in the following list and in the later list of public law matters were taken before the *Ringeisen* case was decided by the Court; a few were taken after the Court had confirmed the Commission's private law approach in that case.

<sup>5</sup> A.2145/64, *Y.B.E.C.H.R.*, 8 (1965), p. 282 (property tax); A.1904/63, etc., *ibid.*, 9 (1966), p. 268 (profits tax); A.2552/65, *C.D.E.C.H.R.*, 26 (1967), p. 1 (income tax); A.5421/72, *ibid.*, 43 (1972), p. 94. Cf. *Kantara Shipping Ltd. v. Republic of Cyprus*, (1971) 4 J.S.C. 839, at p. 844 (Supreme Court of Cyprus) (also digested in Directorate of Human Rights, Council of Europe, *Collection of Decisions of National Courts referring to the Convention* (hereafter referred to as *C.D.N.C.C.*), Article 6, p. 129), and the decision of 27 October 1971 of the Belgian Supreme Court, *C.D.N.C.C.*, Article 6, p. 125.

<sup>6</sup> A.2248/64, *Y.B.E.C.H.R.*, 10 (1968), p. 170 (social security contributions); A.3959/69, *C.D.E.C.H.R.*, 35 (1970), p. 109 (war disability pension).

<sup>7</sup> A.3011/67, *C.D.E.C.H.R.*, 25 (1967), p. 70; A.3925/69, *ibid.*, 32 (1970), p. 56.

<sup>8</sup> A.2504/65 (1968) (unreported: see Eissen, *loc. cit.* (above, p. 158 n. 4) at p. 462).

<sup>9</sup> A.423/58, *C.D.E.C.H.R.*, 1 (1959) (employment as a judge in West Germany); A.3937/69, *ibid.*, 32 (1969), p. 61 (employment in an *établissement public* in Belgian law (an institution comparable to a public corporation in English law)); A.4291/69, *ibid.*, 35 (1970), p. 165 (employment in the Belgian Foreign Office).

<sup>10</sup> The *Boy Soldiers* case, A.3435/67, etc., *Y.B.E.C.H.R.*, 11 (1968), p. 562 (applications for discharge from the British Armed Forces).

<sup>11</sup> A.448/59, *Y.B.E.C.H.R.*, 3 (1960), p. 254.

<sup>12</sup> A.1931/63, *Y.B.E.C.H.R.*, 7 (1964), p. 212 (enrolment as a probationary barrister (*Rechtsanwaltsanwärter*) in Austria); A.2568/65, *C.D.E.C.H.R.*, 26 (1968), p. 10 (admission to the bar to practise law in Belgium). Lawyers are not civil servants in either of the two legal systems concerned in the above cases or in the law of the contracting parties generally. The Commission explained its ruling in the second case as follows: '... the Commission has, in particular, had regard to features peculiar to the bar as a profession; indeed, barristers are called upon to exercise important functions in the administration of justice, in civil as well as criminal cases, and the question whether or not a person should be admitted to exercise such functions cannot be considered to be a question of the determination of his civil rights ...' *C.D.E.C.H.R.*, 26 (1968), p. 17. It is not clear from this reasoning whether the Commission would, in terms of English law, treat solicitors in some or all cases on the same footing as barristers for the present purpose.



- a claim to the nationality of a State<sup>1</sup>
- certain matters concerning criminal proceedings,<sup>2</sup> including the release of an accused on bail,<sup>3</sup> the revocation of the suspension of a sentence<sup>4</sup> or of a pardon,<sup>5</sup> and an application for clemency<sup>6</sup> or parole ('conditional release')<sup>7</sup>
- compensation paid by the state out of public funds in respect of injuries arising out of the Second World War<sup>8</sup>
- the disciplining of civil servants,<sup>9</sup> lawyers,<sup>10</sup> doctors,<sup>11</sup> policemen<sup>12</sup> and prisoners.<sup>13</sup>

The Commission has regarded all of these as being matters of public law. In contrast, and on the same basis, it has taken the view that decisions on the following matters do concern 'civil rights and obligations' in the sense of Article 6 (1):

- parental access to children<sup>14</sup>
- 'compensation for loss of holidays and pay during illness'<sup>15</sup>
- negligence by the personnel of a public hospital<sup>16</sup> or by prison medical authorities<sup>17</sup>
- 'the right to enjoy a good reputation and the right to have determined before a tribunal the justification of attacks upon such reputation'<sup>18</sup>
- claims arising under a commercial contract<sup>19</sup>
- wrongful dismissal of a teacher in a state school<sup>20</sup>

<sup>1</sup> A.5212/71, *C.D.E.C.H.R.*, 43 (1972), p. 69.

<sup>2</sup> See generally Mr. Sørensen, for the Commission, *Neumeister* case, *Pleadings*, p. 217.

<sup>3</sup> See the Commission's report in the *Neumeister* case, *Pleadings*, p. 83.

<sup>4</sup> A.2428/65, *C.D.E.C.H.R.*, 25 (1967), p. 1.

<sup>5</sup> A.1140/61, *ibid.*, 8 (1961), p. 57.

<sup>6</sup> A.1127/61, *ibid.*, 8 (1961), p. 9.

<sup>7</sup> A.1760/63, *Y.B.E.C.H.R.*, 9 (1966), p. 166.

<sup>8</sup> A.4505/70, *Y.B.E.C.H.R.*, 14 (1971), p. 522 (concerning the West German Federal Liability Equalisation Act (*Lastenausgleichsgesetz*)); A.4618/70, *C.D.E.C.H.R.*, 40 (1972), p. 11 (concerning the West German Federal Compensation Act (*Bundesentschädigungsgesetz*)). But see A.4304/69, *C.D.E.C.H.R.*, 36 (1970), p. 76, discussed below, p. 193 n. 4.

<sup>9</sup> A.734/60, *C.D.E.C.H.R.*, 6 (1961), p. 29. Cf. the decision of 12 June 1964 of the Austrian Constitutional Court, *C.D.N.C.C.*, Article 6, p. 40.

<sup>10</sup> A.2793/66, *C.D.E.C.H.R.*, 23 (1967), p. 125; A.2872/66, *ibid.*, 24 (1967), p. 113; A.4561/70, *ibid.*, 39 (1971), p. 58; A.5109/71, *ibid.*, 42 (1972), p. 82. Cf. the decision of 15 March 1965 of the Belgian Supreme Court, *Pasicrisie Belge*, 1965, vol. 1, pp. 735, 737, *C.D.N.C.C.*, Article 6, p. 46, and the decision of 29 September 1970 of the Austrian Constitutional Court, *Österreichische Juristen-Zeitung*, 1971, p. 413, *C.D.N.C.C.*, Article 6, p. 118.

<sup>11</sup> A.4519/70, *C.D.E.C.H.R.*, 37 (1971).

<sup>12</sup> A.4121/69, *C.D.E.C.H.R.*, 33 (1970), p. 23.

<sup>13</sup> A.4300/69, *C.D.E.C.H.R.*, 37 (1970), p. 78. In the cases cited in this note and in the two previous notes, the Commission limited itself to ruling that Article 6 did not apply because disciplinary offences are not criminal offences for the purpose of Article 6. It can be taken that it was assumed that no civil right or obligation was involved either. As to disciplinary proceedings against soldiers, see the decision as to admissibility in the *Five Soldiers* case, A.5100/71, etc., *C.D.E.C.H.R.*, 42 (1972), p. 61. This last case is still pending before the Commission.

<sup>14</sup> A.434/58, *Y.B.E.C.H.R.*, 2 (1959), p. 354. See also A.1329/62, *ibid.*, 5 (1962), p. 200, and A.1475/62, *C.D.E.C.H.R.*, 11 (1963), p. 47 (a case of custody).

<sup>15</sup> A.1013/61, *Y.B.E.C.H.R.*, 5 (1962), p. 158 (a claim by an employee against a private employer). See also A.1197/61, *ibid.*, 5 (1962), p. 88.

<sup>16</sup> A.1092/61, *C.D.E.C.H.R.*, 9 (1962), p. 37.

<sup>17</sup> A.4933/71, *C.D.E.C.H.R.*, 43 (1972), p. 24. See also the *Knechtel* case, *Y.B.E.C.H.R.*, 13 (1970), p. 730.

<sup>18</sup> *Isop v. Austria*, *Y.B.E.C.H.R.*, 5 (1962), p. 108 (*quaere* whether the right to bring proceedings for defamation is really a private law right: see above, p. 162 n. 4); A.3374/67, *Y.B.E.C.H.R.*, 12 (1969), p. 247. See also the *Golder* case (above, p. 162 n. 5).

<sup>19</sup> A.1420/62, etc., *Y.B.E.C.H.R.*, 6 (1963), p. 590.

<sup>20</sup> See A.4798/71, *C.D.E.C.H.R.*, 40 (1972), p. 31 ('an action for wrongful dismissal in an English County Court . . . appears to have been the determination of a civil right').

- disputes between private litigants as to patent rights<sup>1</sup>
- a decision by a public authority to expropriate private property.<sup>2</sup>

If it is correct to assume that most, if not all, of these decisions of the Commission would be confirmed by the Court, the restrictions inherent in a private law reading of 'civil rights and obligations' are at once apparent.

(c) *The Alam and Khan line of cases: A 'civil liberties' meaning?* In a line of 'immigration' cases in 1967 and 1968, the Commission seemed tempted to abandon, or else to supplement, its private law interpretation of 'civil rights and obligations'. It seemed tempted, in particular, to accept that the term 'civil rights' in that phrase had, at least in part, a 'civil liberties' or 'human rights' meaning. In other words it would include rights of the sort that are protected in a national 'Bill of Rights'<sup>3</sup> or an international document such as the European Convention on Human Rights or the Universal Declaration of Human Rights<sup>4</sup> (which includes economic and social rights). Although in retrospect this can be seen as a temporary and inconsequential dalliance, it is none the less instructive to examine the cases concerned. The first two were the *Alam and Khan* and *Singh* cases,<sup>5</sup> the decisions as to admissibility in which were taken in July 1967. In the *Alam and Khan* case, the first applicant was a citizen of Pakistan and hence a Commonwealth citizen under the British Nationality Act 1948. He had been admitted to the United Kingdom in 1957, having left his two wives and his children in Pakistan. In 1966, the second applicant, aged 13, who claimed to be the first applicant's son, arrived at London airport from Pakistan to take up residence with his father in the United Kingdom. The immigration authorities did not believe that he was the first applicant's son and refused to admit him. If the facts were as the applicant claimed, the second applicant had a legal right under the Commonwealth Immigrants Act, 1962,<sup>6</sup> to join his father as a dependent. In their application to Strasbourg, the applicants alleged that the refusal to admit the second applicant was, *inter alia*, a violation of the right to respect for family life protected by Article 8 of the Convention and of the right to a fair trial in Article 6. The second of these allegations concerned the procedure followed by the immigration authorities in taking their decision to exclude the second applicant. The Commission admitted the application so far as

<sup>1</sup> A.5460/72, *C.D.E.C.H.R.*, 43 (1972), p. 99. A decision by the Austrian Patent Office as to the award of a patent was, however, held not to concern 'civil rights and obligations' by the Austrian Constitutional Court, decision of 19 March 1968, *Österreichische Juristen-Zeitung*, 1969, p. 25, *Juristische Blätter*, 1969, p. 212, *C.D.N.C.C.*, Article 6, p. 91.

<sup>2</sup> See A.5428/72, *C.D.E.C.H.R.*, 44 (1973), p. 49. The case is summarized below, p. 187 n. 4. The Commission did not in fact *rule* that the above kind of decision concerned 'private law rights and obligations'; it was, however, sympathetic to this view. See also A.3651/68, *Y.B.E.C.H.R.*, 13 (1970), p. 476.

<sup>3</sup> e.g. the 'Bill of Rights' in the United States Constitution (i.e. the first ten amendments to the Constitution).

<sup>4</sup> For the text, see General Assembly Resolution 217A, U.N. Doc. A./811, *General Assembly Official Records*, 3rd Session, Part I, Resolutions, p. 71; Brownlie, *Basic Documents on Human Rights* (1971), p. 106.

<sup>5</sup> A.2991/66 and A.2992/66. The two cases were joined and are reported together in *Y.B.E.C.H.R.*, 10 (1967), p. 478.

<sup>6</sup> S.2 (2) (b). The 1962 Act has now been replaced by the Immigration Act, 1971.

it related to Article 8 on the ground that it raised issues of law and fact the determination of which should depend upon an examination of the merits of the case. The Commission then also admitted the Article 6 complaint, giving its reasons as follows:

Whereas the determination of the question whether the Applicants had in this respect any civil right under Article 6, paragraph (1), depends substantially upon the determination of the question whether or not the refusal of the immigration authorities to allow the minor child Mohamed Khan to enter the United Kingdom to take up residence with his father Mohamed Alam was unjustified interference with the family life of the Applicants within the meaning of Article 8; whereas the determination of a right to respect for family life under Article 8 may well be considered as the determination of a civil right within the meaning of Article 8; whereas the Commission has just held that this complaint of the Applicants under Article 8 cannot be declared manifestly ill-founded;

Whereas the Applicants' further complaint that they were denied a fair and public hearing before an independent and impartial tribunal for the determination of such civil right raises questions of such complexity that their determination must depend upon an examination of the merits of the case; whereas accordingly this further complaint of the Applicants under Article 6, paragraph (1), can again not be regarded as manifestly ill-founded within the meaning of Article 27, paragraph (2) of the Convention.<sup>1</sup>

A friendly settlement of the case was later achieved<sup>2</sup> so that no further ruling on the points of law involved was made.

In the *Singh* case, also, the question was one of immigration into the United Kingdom under the Commonwealth Immigrants Act, 1962. The applicant, aged 33, was of Indian origin. He had come from India to settle in the United Kingdom with his wife and children and had registered as a United Kingdom citizen. In 1966, his father arrived at London airport from India to join the applicant's household, but was refused admission. The immigration authorities had a discretionary power in this regard under the Commonwealth Immigrants Act.<sup>3</sup> The applicant alleged a violation of the right to family life in Article 8 of the Convention by this refusal. The Commission rejected this allegation as manifestly ill-founded on the facts of the case. It thereupon also rejected as incompatible with the provisions of the Convention a second allegation that Article 6 had been infringed by the way in which the immigration authorities had taken their decision. The Commission gave its reasons for this second decision as follows:

Whereas the Commission has just held that the Applicant failed to establish his right to family life within the meaning of Article 8 of the Convention; whereas it follows that the Applicant had no right to the entry of his widowed father to join him which could be considered as a 'civil right' within the meaning of Article 6, paragraph (1) of the Convention; whereas consequently it is not necessary to consider the substance of the Applicant's further complaint that he was denied a fair and public hearing

<sup>1</sup> *Y.B.E.C.H.R.*, 10 (1967), p. 504.

<sup>2</sup> See *ibid.*, 11 (1968), p. 788.

<sup>3</sup> See Commonwealth Immigrants Act, 1962, ss. 2 (1) and 16 (3), and the 1962 Instructions to Immigration Officers (Cmd. 1716), paras. 2 and 30.



before an independent and impartial tribunal; whereas it follows that this part of the Application is incompatible with the provisions of the Convention within the meaning of Article 27, paragraph (2).<sup>1</sup>

It is helpful to consider these two cases together. In the *Alam and Khan* case, the Commission stated that the right to family life in Article 8 'may well' be a 'civil right' in the sense of Article 6 (1); in the *Singh* case, it implied that if the applicant had established that his case came within Article 8, the decision as to the entry of his father would then have come within Article 6. Yet the right being directly determined by the immigration officers at London airport in these cases was a public law right, viz. the right to enter and reside in the territory of a State. The Commission did not comment upon this fact. One would have expected it, in accordance with its previous practice, to have rejected the application as inadmissible because it did not concern a private law matter. The right to family life in Article 8 of the Convention, which, *arguendo*, was *indirectly* being determined at London airport, is probably a private law right for the purposes of Article 6 (1); certainly family law is generally treated as a part of private law in civil law systems,<sup>2</sup> and the Commission had already acted in another case on the basis that the right of access to one's children was a private law right.<sup>3</sup> It would, however, have been a new departure for the Commission to have ruled that a right was subject to 'determination' in the sense of Article 6 (1) when it was being *indirectly*, and not directly, determined.<sup>4</sup> The better view, it is believed, is that in the extracts from its decisions in these two cases quoted above the Commission had in mind a 'civil liberties' meaning of 'civil rights' different from the private law meaning which it had consistently and exclusively used in its earlier case law.

Some further light was thrown upon the matter by a case decided five months later, in December 1967. A.3325/67<sup>5</sup> was again a case of immigration under the Commonwealth Immigrants Act, 1962. As in the *Singh* case, the decision refusing the applicant entry was a discretionary one under that Act; the applicant had no legal right of entry. As in that case also, an allegation of a violation of the right to family life in Article 8 was rejected by the Commission as manifestly ill-founded. An allegation that the decision to refuse entry was taken contrary to Article 6 (1) was treated as follows. The Commission first did what it had not done in the *Alam and Khan* and *Singh* cases; it applied its private law-public law distinction to the right of entry into a State and held that it was a public law right, with the result that the allegation fell outside Article 6 (1). However, in response to the applicant's argument, the Commission then examined the case from the point of view adopted in *Alam and Khan*. It noted, with some caution, that 'the rights of the applicants to live together as a family *may be* among the "civil rights" covered by Article 6, paragraph (1)'.<sup>6</sup> Having found, however, that there was on the facts of the case no violation of 'those rights' (which must be taken to be the rights to family life of the applicants as defined in Article 8),

<sup>1</sup> Y.B.E.C.H.R., 10 (1967), p. 502.

<sup>3</sup> A.434/58, Y.B.E.C.H.R., 2 (1959), p. 354.

<sup>5</sup> A.3325/67, Y.B.E.C.H.R., 10 (1967), p. 528.

<sup>2</sup> See above, p. 164.

<sup>4</sup> See below, p. 184.

<sup>6</sup> Ibid., at p. 538. Italics added.

the Commission decided that the case did not come within Article 6 on an *Alam and Khan* basis either.

What is interesting, if somewhat puzzling, is that in A.3325/67, the Commission first applied its well-established private law–public law distinction and then, separately and additionally, applied the approach it had courted in the *Alam and Khan* and *Singh* cases. There was no suggestion, therefore, that the *Alam and Khan* approach was to replace the private law approach. It was to supplement it. If a right was not a ‘civil right’ according to the private law–public law distinction, it might none the less qualify under the *Alam and Khan* approach—if the Commission were ultimately to adopt it.

But that policy presents certain problems. It could scarcely have been intended to give a single term two distinct and, in some cases, conflicting meanings in the same text. A ‘civil liberties’ approach also ignores the ‘obligations’ part of ‘civil rights and obligations’. One would, moreover, have to decide what ‘civil rights’ are included, although this, of course, could be done. Presumably they would include all of the rights protected in the European Convention and its Protocols. They might, although there is no evidence in the Commission’s jurisprudence to this effect, extend to the whole of the Universal Declaration on Human Rights, 1948,<sup>1</sup> or the United Nations Covenants, including the economic and social rights in these documents. On the whole, it is improbable that the *Alam and Khan* approach is a correct interpretation of the Convention.<sup>2</sup>

The final development was the ruling in the *Neumeister* case,<sup>3</sup> in which the Court delivered judgment in June 1968, almost a year after the decision as to admissibility in the *Alam and Khan* case. One of the questions before the Court in that case was whether Article 6 had been violated in proceedings for the examination of requests by the applicant for release pending trial on criminal charges. In its report on the case, which was adopted in 1966, the Commission expressed the opinion, by 7 to 5,<sup>4</sup> that such proceedings did not come within Article 6, so that no question of a violation of that provision arose. The majority view was that Article 6 (1) ‘cannot reasonably be given such a wide interpretation as to include the kind of proceedings concerned . . .’.<sup>5</sup> The dissenting members pointed out that proceedings concerning pre-trial detention related to the right protected by Article 5 (3) of the Convention of trial within a reasonable time or release pending trial. In their opinion, that right was a ‘civil right’ for the purposes of Article 6 (1); consequently, bail proceedings were subject to Article 6 (1). The minority noted, however, that the question of the legality of the proceedings under the Convention could be dealt with by the application of Article 5 (4),<sup>6</sup> which was expressly designed to deal with cases of detention. In their opinion (the majority disagreed), this provision incorporated the requirement of ‘equality of arms’ which was the basis of the ‘fair trial’ allegation in the

<sup>1</sup> loc. cit. (above, p. 167 n. 4).

<sup>2</sup> Cf. Golsong, loc. cit. (above, p. 158 n. 4), p. 260.

<sup>4</sup> For details of the vote, see below, p. 173 n. 1.

<sup>3</sup> *Neumeister* case, *Judgment*.

<sup>5</sup> *Neumeister* case, *Pleadings*.

<sup>6</sup> Article 5 (4) reads: ‘Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.’

case. In this situation the dissenting members decided that a violation of the Convention had occurred under Article 5 (4) and did not pursue the question of a violation of Article 6 to its conclusion.<sup>1</sup> In the oral hearings in the case, which occurred in 1968, after the *Alam and Khan* and *Singh* cases and A.3325/67 had been decided at the admissibility stage, the Commission explained the decision taken in its report in terms of the private law–public law distinction: ‘the right to personal liberty and the restriction which may be imposed upon a suspected criminal’ were not matters of private law.<sup>2</sup> The view of the minority was not developed. The Court agreed with the Commission:

Certain members of the Commission have found in favour of the opposing view, expressing the opinion that such requests relate to ‘civil rights and obligations’ and that any case relating to those rights must under Article 6 (1) be given a fair hearing.

This argument does not seem to be well founded. Quite apart from the excessively wide scope it gives to the concept of ‘civil rights’, the limits of which the Commission has sought to fix on a number of occasions, it must be observed that remedies relating to detention on remand undoubtedly belong to the realm of criminal law and that the text of the provision invoked expressly limits the requirement of a fair hearing to the determination . . . of any criminal charge to which notion the remedies in question are obviously unrelated.<sup>3</sup>

It thus emphatically rejected the approach of the minority of the Commission: that approach gave ‘an exceedingly wide scope’ to Article 6 and, as far as the particular facts of the *Neumeister* case were concerned, the proceedings clearly related to criminal law, which was a part of public law. It is, of course, not wholly clear what it was that the Court was rejecting; the approach taken by the minority is only very briefly stated in the Commission’s report in the case and was not developed in oral argument before the Court. It seems to have been in step with that tentatively approved by the Commission in the *Alam and Khan* case (so far as it is possible to be sure what that was), and the arguments brought to bear by the Court on the minority’s approach in the *Neumeister* case would seem to apply equally to that of the Commission as a whole in the *Alam and Khan* case.

The question remains, however, how widely one should read the judgment in the *Neumeister* case. It is possible to limit it to the criminal law context so that *Alam and Khan* might apply to its own facts and to other situations unconnected with criminal proceedings. The Court’s general reference to ‘the excessively wide scope’ which the approach of the minority of the Commission would give to Article 6, coupled with what seems to be tacit approval by the Court of the Commission’s civil law–public law distinction (‘the limits of which [i.e. the scope of Article 6] the Commission has sought to fix on a number of occasions’), tends to suggest otherwise. The Court should be understood, correctly, it is believed, as having rejected a ‘civil liberties’ meaning of ‘civil rights’ in Article 6 (1) of the sort that seemed at one point to be gaining favour within the

<sup>1</sup> *Neumeister* case, *Pleadings*, pp. 84–5.

<sup>2</sup> *Ibid.*, p. 217.

<sup>3</sup> *Neumeister* case, *Judgment*, p. 43.



Commission,<sup>1</sup> apparently as a supplement to a private law meaning of that phrase.<sup>2</sup>

(d) *The arguments for a 'private law' meaning.* Reverting to the *Ringeisen* case, it is noticeable that the Court gave no reason for adopting a private law interpretation of 'civil rights and obligations'. This is disappointing. Its meaning is not obvious and has been the subject of much debate.<sup>3</sup> It would have been more in keeping with the Court's role as the final authority on the meaning of the Convention to have examined such an important question fully in its judgment rather than just to have stated a bare conclusion and to have done that only obliquely.<sup>4</sup>

Some guidance as to the Court's thinking may, however, be found in the reasoning urged upon it by the Commission in both the *Ringeisen*<sup>5</sup> and *Neumeister*<sup>6</sup> cases. Even if this is not so, that reasoning still calls for examination. Taking the English text first, the Commission was of the opinion that 'civil rights and obligations' was not a term of art at common law and had no obvious meaning. The same uncertainty did not exist, the Commission thought, in the French text; 'droits et obligations de caractère civil' undoubtedly incorporated the civil law distinction between private and public law. In the resulting situation, where the two authentic texts were not equally clear, the correct approach, the Commission argued, was to rely primarily upon the clearer text, in this case the French one. This conclusion was supported by the evidence of the preparatory work of the Convention which showed that it was the French text which more accurately represented the intentions of the signatory states.<sup>7</sup>

<sup>1</sup> It is not possible from the published records to document the voting of all of the members of the Commission who participated in the decisions that have been discussed. It is clear, however, that during the period covered by the decisions as to admissibility in the *Alam and Khan* and *Singh* cases and A.3325/67 opinion was fairly evenly divided within the Commission.

<sup>2</sup> The *Alam and Khan* approach was also relied upon before the Commission in the *Boy Soldiers* case, A.3435/67, etc., *Y.B.E.C.H.R.*, 11 (1968), p. 562, the decision as to admissibility in which was taken less than a month after the Court's decision in the *Neumeister* case. It was argued there that Article 6 (1) applied to decisions taken by British army and naval authorities, acting in accordance with discretionary powers under British law, to refuse to discharge a number of boy soldiers and sailors before their 9-year term of service had expired. This was so, it was argued, because the Convention right in Article 4 not to be subjected to involuntary servitude was being determined and because that right was a 'civil right'. The Commission found no need to rule upon the correctness of this argument. In the Commission's view, 'even assuming' that the right in Article 4 was a 'civil right' in the sense of Article 6, there was no question of a violation of Article 4 on the facts of the case. The Commission did not refer to the *Neumeister* case in its decision. The only reported cases since then in which the Commission may possibly have been considering the application of a 'civil liberties' meaning of Article 6 (1) are the *East African Asians* cases, *Y.B.E.C.H.R.*, 13 (1970), p. 928 at p. 1006 and the pending *Five Soldiers* case, A.5100/71, *C.D.E.C.H.R.*, 42 (1972), p. 61 (see the argument of the applicants at p. 78).

<sup>3</sup> See the literature cited at p. 158 n. 4 above.

<sup>4</sup> Contrast the Court's full discussion of the local remedies issue raised in the same case: *Ringeisen* case, *Judgment*, pp. 36-8.

<sup>5</sup> See *Ringeisen* case, *Pleadings*, pp. 69-72 (Report of the Commission) and 229-35 (public hearings).

<sup>6</sup> See *Neumeister* case, *Pleadings*, pp. 83-5 (Report of the Commission) and 214-17 (public hearings).

<sup>7</sup> The argument summarized in the last two sentences above was specifically that used by the Commission in the *Ringeisen* case. Earlier, in the *Neumeister* case, the Commission had taken a

Whereas the Commission was unanimous in its readings of the English text, it was divided in its approach to the French text and, consequently, in its final interpretation of Article 6 (1). In both the *Neumeister* and *Ringeisen* cases, the view expressed in the Commission's name was adopted by the narrow majority of 7 to 5.<sup>1</sup> The approach taken by the minority in the *Ringeisen* case is particularly interesting.<sup>2</sup> It was pointed out that the term used was 'droits . . . de caractère civil', not 'droits civils'. Whereas, in the view of the minority, the latter term suggested the private law–public law distinction, the former did not.<sup>3</sup> It hinted instead at a wider, though by no means self-evident, field of application for Article 6 (1) and was purposely used to avoid the narrow, private law meaning of 'droits civils'. In this situation, where both of the authentic language texts were obscure, the minority sought to find for them a common meaning in keeping with the object and purpose of the Convention.<sup>4</sup> In its submission, Article 6 (1) should be understood as referring to 'those rights and obligations which are established by law for the individual in his relation with other persons or with the State and its various agencies in such matters as personal status, property, contract and fault'.<sup>5</sup> Decisions concerning the compulsory acquisition of property for public purposes were suggested as an example of decisions which would come within Article 6 (1) on this interpretation.

(e) *An assessment of these arguments.* The Commission was undoubtedly correct in its unanimous reading of the English text. 'Civil rights and obligations' is not a legal term and has no clear meaning. It could refer to the whole of a person's rights and obligations in law other than those in criminal law. Such an interpretation would give 'civil' a negative, 'catch-all' meaning which is not unknown when 'civil' and 'criminal' are placed in juxtaposition as they are in Article 6 (1). It would also give Article 6 (1) a much wider field of application than the Court's private law interpretation; it would, in particular, include, in terms of substantive law, administrative law rights and obligations. Alternatively, 'civil rights and obligations' could mean those legal rights and obligations which are, in the law of the contracting party concerned, enforceable in a civil, as opposed to a criminal, court. It could, that is, have what has earlier slightly different approach, although with the same result. It had argued that there the phrase 'civil rights and obligations' was ambiguous when the two authentic language versions of Article 6 (1) were read together. Recourse could therefore be had to the preparatory work which showed that the intention was, as the Commission argued in the *Ringeisen* case, best reflected in the French text.

<sup>1</sup> The majority in the *Neumeister* case consisted of Messrs. Petrén (President), Eustathiades (Vice-President), Susterhenn, Sørensen, Ermacora, Castberg and Maguire. Mme Janssen-Pevtschin and Messrs. Sperduti, Fawcett, Welter and Balta dissented. The majority in the *Ringeisen* case consisted of Messrs. Sørensen (President), Castberg, Welter, O'Donogue, Delahaye, Lindal and Kellberg. Messrs. Fawcett (Vice-President), Susterhenn, Sperduti, Balta and Busuttil dissented. The division of opinion within the Commission in the *Ringeisen* case on the question of the meaning of 'civil rights and obligations' was one of the reasons why the case was referred to the Court: *Ringeisen* case, *Pleadings*, p. 207.

<sup>2</sup> In the *Neumeister* case, the minority took an *Alam and Khan* approach: see above, p. 171 et seq.

<sup>3</sup> Cf. Golsong, loc. cit. (above, p. 158 n. 4), p. 250.

<sup>4</sup> The minority cited a passage in the *Wemhoff* case, *European Court of Human Rights*, Judgment of 27 June 1968, p. 23 (quoted in part at p. 175 n. 1 below), and Art. 33 (4), Vienna Convention on the Law of Treaties, Misc. 19 (1971), Cmd. 4818, in support of this approach.

<sup>5</sup> *Ringeisen* case, *Pleadings*, p. 241.



been called a 'forum', as opposed to a 'substantive', meaning.<sup>1</sup> In this context, a civil court would probably be understood to be a court, other than a criminal court, in the ordinary system of courts. It would probably not include an administrative or other special court or tribunal. This second interpretation again finds support in the distinction between 'civil' and 'criminal' in the text and conforms with the common lawyer's tendency to see law in terms of remedies.<sup>2</sup> It would, to the extent that cases involving governmental liability in contract or in tort are a part of public law,<sup>3</sup> widen the scope of Article 6 (1) as far as common law jurisdictions are concerned since all such cases normally are heard by the ordinary courts and not by special administrative courts. The same would be true for those civil law systems (e.g. those in Belgium, Italy and West Germany) in which cases of government liability are heard by the ordinary courts also.<sup>4</sup>

Such a 'forum' approach would have the weakness, however, that a State might, either intentionally or by accident, avoid the application of Article 6 (1) to a particular area of its law by not providing a remedy through such courts or tribunals as come within its field of application.<sup>5</sup> It would also mean rejecting the view that Article 6 (1) provides a 'right to a tribunal' in all cases involving the determination of 'civil rights and obligations'.<sup>6</sup> A third interpretation would give 'civil rights and obligations' a 'civil liberties' meaning.<sup>7</sup> As noted earlier,<sup>8</sup> this would ignore the 'obligations' part of the phrase and, on most views of what 'civil liberties' are, would, if it were the exclusive meaning of the phrase, omit the majority of ordinary cases in contract, tort, etc., which would be surprising.<sup>9</sup> Other interpretations are possible.<sup>10</sup> What is remarkable, given the many conjectural interpretations that the obscurity of the English text allows, is that the one adopted by the Court scarcely comes into the reckoning. It is certainly not one that would readily occur to a common lawyer.

The main obstacle standing in the way of the Commission's private law interpretation of the French text is the need when interpreting a treaty to read the text from the start in the light of its object and purpose.<sup>11</sup> The European Convention is intended to protect the rights of the individual against the State.

<sup>1</sup> Above, p. 161.

<sup>2</sup> It is of interest that the British Government argued, unsuccessfully, for this second interpretation in several cases before the Commission in the 1960s: see e.g., the *Alam and Khan* case, A.2991/66, Y.B.E.C.H.R., 10 (1967), p. 478. As noted earlier, the Commission (and now the Court) has adopted a 'substantive', not a 'forum', approach to 'civil rights and obligations': see above, pp. 161-3.

<sup>3</sup> See below, p. 183.  
<sup>4</sup> See Schlesinger, op. cit. (above, p. 158 n. 4), pp. 347 et seq., and the national reports on Belgium and Italy in *Judicial Protection against the Executive*, Vol. II (above, p. 158 n. 4).

<sup>5</sup> Cf. above, p. 163, and see Schwelb, loc. cit. (above, p. 158 n. 4), p. 575, and *Buergenthal I*, loc. cit. (above, p. 158 n. 4), p. 47. The same comment was made in argument by the applicant in A.2076/63, C.D.E.C.H.R., 23 (1967), p. 74 at p. 76.

<sup>6</sup> See Eissen, loc. cit. (above, p. 158 n. 4).

<sup>7</sup> Cf. above, p. 167.

<sup>8</sup> Above, p. 170.

<sup>9</sup> Cf. the view of the Commission in its Report in the *Ringeisen* case, *Pleadings*, p. 229.

<sup>10</sup> Some may be derived from the definition of 'civil' in *Jowitt's Dictionary of English Law*, vol. I (1959), p. 377: 'Civil may stand, according to the context, for the opposite of criminal, of ecclesiastical, of military, or of political.'

<sup>11</sup> See Art. 31, Vienna Convention on the Law of Treaties, 1969, Misc. 19 (1971), Cmnd. 4818. The rules on treaty interpretation in the Vienna Convention probably reflect customary international law. This is the British view: Cmnd. 4589, p. 15.



Given this, and given the fact that the right to a fair trial is in most cases as important in public law as it is in private law, the inference is that it must require very clear wording to allow one to say that the French (or, for that matter, the English) text should be limited to private law rights and obligations. Support for this view is found in an earlier judgment of the Court itself. In the *Delcourt* case, when considering whether Article 6 (1) applied to proceedings before a court of cassation in a criminal case, the Court stated:

In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 (1) would not correspond to the aim and the purpose of that provision (see, *mutatis mutandis*, the *Wemhoff* judgment of 27 June 1968, 'As to the Law' paragraph 8).<sup>1</sup>

One argument favouring a private law interpretation of the French text is that it is difficult to see what other particular meaning of 'droits et obligations de caractère civil' could have been intended. In other words, if it does not have a private law meaning, the French text is scarcely less obscure than the English. It could refer to the distinction within the field of private law between *droit civil* and *droit commercial*, so that commercial law would be outside Article 6 (1). This, however, would limit Article 6 (1) even further. The fact that 'civil' is in apposition to 'pénale' also tends to weigh against such an interpretation. Another possibility is one mentioned earlier when discussing the meaning of 'civil rights and obligations' in the English text, viz. that 'civil' in the French text has the negative meaning of a right or obligation in law other than one in criminal law. That this is a possible meaning appears from the drafting of the Universal Declaration of Human Rights,<sup>2</sup> although it was not the meaning intended by the French representative on the United Nations Commission on Human Rights (M. Cassin) who, in effect, introduced this part of the French text of Article 6 (1).<sup>3</sup> A further interesting fact is that in the *Ringeisen* case the Austrian Government suggested<sup>4</sup> a plausible, though wholly conjectural, explanation of the absence of the phrase 'droits civils', which the minority of the Commission had found significant. In the opinion of the Austrian Government, the phrase 'droits et obligations civils', as it would have been in full, was purposely avoided because 'obligations civils' would have referred not to private

<sup>1</sup> *Delcourt* case, *Judgment* of 17 January, 1970, p. 15. The paragraph from the judgment in the *Wemhoff* case to which the Court refers reads in part: 'Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.' It was this paragraph as a whole that the minority of the Commission relied upon in the *Ringeisen* case: see above, p. 173 n. 4. In the *Lawless* case (Preliminary Objections and Questions of Procedure), *Judgment* of 14 November 1960, p. 13, the Court referred to the 'fundamental principle . . . upheld in Article 6' that 'proceedings before the judiciary [*devant un organe judiciaire* in the French text] should be conducted in the presence of the parties and in public'. There is nothing to suggest, however, that the Court intended by this to give a considered opinion as to the field of application of Article 6 and to indicate, in particular, that it only applies to proceedings before the ordinary courts: cf. Vasak, *op. cit.* (above, p. 158 n. 4), p. 38 n. 47.

<sup>2</sup> See below, pp. 176-7.

<sup>3</sup> See below, p. 176.

<sup>4</sup> *Ringeisen* case, *Pleadings*, p. 250.

law obligations but to obligations that a person has as a citizen (e.g. an obligation to do national service). The wording actually used was, Austria argued, intended to avoid this problem. Whether the Commission considered this argument when preparing its report is not known. The spokesman for the minority in the public hearings in the case did not reply to the Austrian Government's argument on this point.<sup>1</sup> In contrast, one consideration indicating a lack of clarity in the French text is that the Commission was so divided in its interpretation of it. There is also the fact that commentators on the Convention are far from unanimous, with a fairly even split between those who favour a private law reading and those who do not.<sup>2</sup>

Whatever view of the French text is taken, there is sufficient uncertainty about the meaning of the Convention text as a whole to justify recourse to its preparatory work.<sup>3</sup> Unfortunately, this is inconclusive.<sup>4</sup> It is possible both to find evidence supporting a 'private law' reading of 'civil rights and obligations' ('droits et obligations de caractère civil') and to find contrary evidence suggesting a wider meaning. Support for a 'private law' interpretation is found in the discussions surrounding the introduction in 1949 into the final French text of the 'fair trial' guarantee of the United Nations Covenant on Civil and Political Rights<sup>5</sup> (Article 14) of the phrase 'droits et obligations de caractère civil'. The draftsmen of the European Convention were instructed to take into account the work of the United Nations in the field of human rights.<sup>6</sup> This they did and there is no doubt that the text of Article 6 (1) owes a great deal to the text of the United Nations Covenant on Civil and Political Rights as it stood when the Convention was drafted in 1949 and 1950. In particular, the phrase 'droits et obligations de caractère civil' in the French text of Article 6 of the Convention was taken word for word from the 1949 draft of Article 14 of the Covenant. This being so, it is relevant to consider what was meant by that wording when it was introduced into the United Nations text. The phrase was adopted at the suggestion of the French and Egyptian representatives on the United Nations Commission on Human Rights (M. Cassin and Mr. Loutfi respectively). They had first proposed<sup>7</sup> the phrase 'droits et obligations', which had been adopted the previous year in the final French text of the 'fair trial' provision of

<sup>1</sup> See *Ringeisen case, Pleadings*, pp. 262 et seq.

<sup>2</sup> Those favouring a private law reading of the French text or of the Convention text as a whole: Echterhölter, p. 145; Geck, p. 526; Mast, p. 111; Morvay, p. 335; Rasenack, p. 64; Schorn, p. 184; Schwelb, p. 574. Those favouring a wider reading: Buergenthal I, p. 46; Buergenthal and Kenewig, p. 410; Golsong, p. 250; Guradze, p. 92; Newman, p. 304 n. 95; Partsch, pp. 142-3; Van der Meersch, p. 271; Velu, *American Journal of Comparative Law*, 18 (1970), p. 259 at p. 268; Wiebringhaus, p. 84. Fawcett, pp. 125-31, and Vasak, p. 39, put the arguments either way. When participating in the *Ringeisen case*, Fawcett favoured a wider reading: see above, p. 173 n. 1, above.

<sup>3</sup> See Art. 32, Vienna Convention on the Law of Treaties, Misc. 19 (1971), Cmnd. 4818.

<sup>4</sup> Cf. Velu, *Revue de droit international et de droit comparé*, 38 (1961), p. 129, at pp. 156, 160, after a thorough study of all the evidence.

<sup>5</sup> Misc. 4 (1967), Cmnd. 3220; *American Journal of International Law*, 61 (1967), p. 870.

<sup>6</sup> See Velu, loc. cit. (above, p. 158 n. 4), pp. 159-60, and the Report of the Commission in the *Ringeisen case, Pleadings*, p. 70. See also the statement by the Commission in the *Boy Soldiers case*, A.3435/67, Y.B.E.C.H.R., 11 (1968), p. 562 at p. 602.

<sup>7</sup> U.N. Doc. E/CN.4/280.

the Universal Declaration of Human Rights<sup>1</sup> (Article 10). This proposal had been opposed by the Danish representative on the Commission (M. Sørensen). The record of the debate reads:

Mr. Sørensen considered that provision was much too broad in scope; it would tend to submit to judicial decision any action taken by administrative organs exercising discretionary power conferred on them by law. He appreciated that the individual should be ensured protection against any abuse of power by administrative organs but the question was extremely delicate and it was doubtful whether the Commissioner could settle it there and then. . . . Mr. Sørensen asked the representatives of France and Egypt whether the scope of the provision in question might be limited to indicate that only cases between individuals and not those between individuals and the State were intended.<sup>2</sup>

The French representative conceded the point:

. . . the Danish representative's statement had convinced him that it was very difficult to settle in that article all questions concerning the exercise of justice in the relationships between individuals and governments. He was therefore prepared to let the words . . . [droits et obligations]<sup>3</sup> in the Franco-Egyptian amendment be replaced by the expression . . . [droits et obligations de caractère civil].<sup>3</sup>

Thus revised, the Franco-Egyptian amendment was adopted. In proposing it in its revised form, the French representative can be taken to have understood that the wording 'droits et obligations de caractère civil', later repeated in Article 6 of the European Convention, was limited to rights and obligations in private law.<sup>4</sup>

But, as suggested, this can be matched by evidence supporting a wider reading of 'civil rights and obligations' ('droits et obligations de caractère civil'). In the first place, although the understanding of the meaning of the phrase 'droits et obligations de caractère civil' of the French representative on the United Nations Commission on Human Rights, when introducing it into the French text of the United Nations Covenant, may have been that it related only

<sup>1</sup> Resolution 217A (III), *General Assembly Official Records*, 3rd Session, Part I, Resolutions, p. 71; *American Journal of International Law*, 43 (1949), Supplement, p. 127. The English text of Article 10 of the Declaration refers to 'his rights and obligations'.

<sup>2</sup> U.N. Doc. E/CN.4/SR 109, pp. 3-4. 8 June 1949.

<sup>3</sup> *Ibid.*, p. 9. 8 June 1949. The wording used in the English translation of the record of the debate is 'rights and obligations' and 'rights and obligations in a suit at law'.

<sup>4</sup> Newman, *loc. cit.* (above, p. 158 n. 4), p. 307, considers that the French representative had a wider objective than this; that he did not intend 'to exclude administrative adjudication'. He points out that M. Cassin had, less than a week earlier, opposed the inclusion of the word 'civil' in the English text of the draft Covenant because 'it did not include fiscal, administrative and military questions, in which matters it was possible to appeal, in the final instance, to court': U.N. Doc. E/CN.4/SR 107, p. 6. 2 June 1949. (See further on the drafting of the English text, below, p. 178.) At this stage, M. Cassin would indeed seem to have wanted to include public law matters. It is submitted that the Danish representative caused him to change his mind and to aim at protecting private law rights and obligations only in Article 14; the complicated problems surrounding the guarantee of a 'fair trial' in public law matters were to be dealt with separately later (they never were). It was in response to the Danish representative (not the United States representative (Mrs. Roosevelt), as Newman suggests) that M. Cassin altered his amendment from 'droits et obligations' to 'droits et obligations de caractère civil'.



to private law rights and obligations, it is apparent from the record of the drafting of the Universal Declaration of Human Rights in 1948 that this interpretation of the significance of 'civil' is not a necessary one and therefore may not have been intended when it was transplanted into the French text of the European Convention. At one point, the draft French text of the Declaration read '*droits et obligations en matière civile*'—a phrase which would appear to be no different in meaning from the phrase '*droits et obligations de caractère civil*'. In the Third Committee of the General Assembly, the Egyptian representative (Mr. Bagdadi) supported by the Cuban and Uruguayan representatives (Mr. Pérez Cisneros and Mr. Jiménez de Aréchaga respectively), sought successfully to have '*en matière civile*' removed because the words 'constituted a restriction'. The French and Belgian representatives (M. Grumbach and Count Carton de Wiart respectively), trained, presumably, in French or French-based law, disagreed. The French representative thought that the words were not restrictive. The Belgian representative, more fully, thought that they were inserted for stylistic purposes, to balance the words '*en matière pénale*' in the draft; they 'did not exclude commercial and public law'. The French and Belgian views may, however, have been influenced by the parallel English text ('rights and obligations'), which differed from that eventually included in the European Convention. This did influence the Mexican representative who spoke in the same vein as the French and Belgian representatives.<sup>1</sup> None the less, they suggest that the wording '*droits et obligations de caractère civil*' need not necessarily be taken as limited to private law rights and obligations.

Secondly, there is the evidence of the drafting of the English text of the European Convention and of the United Nations Covenant on Civil and Political Rights. When the Committee of Ministers of the Council of Europe met in Rome to sign the Convention in November 1950, the relevant part of the English text of Article 6 (1) read 'rights and obligations in a suit at law'. The French text was as it appears now. Like the final French text of Article 6 (1), the draft English text was in fact identical with the final English text of the United Nations Covenant, which had, as events proved, also been settled by the United Nations Commission on Human Rights in 1949. The English text of Article 6 (1) was changed to its present wording—'civil rights and obligations'—by a Committee of Legal Experts just before the Convention was signed. The change was one of a number of 'formal corrections and corrections of translation' made to the Convention as a whole.<sup>2</sup> What is interesting is that not only the phrase struck out but also the phrase that replaced it had in the previous year figured in the drafting of the United Nations Covenant on Civil and Political Rights. At the beginning of 1949, the English text of the Covenant had used the wording 'civil rights and obligations' eventually used in the European Convention. The phrase was deleted at the suggestion of the United States' representative on the

<sup>1</sup> For the debate, see U.N. Doc., *General Assembly Official Records*, 3rd Committee, 115th Meeting, pp. 258 et seq. 28 October 1948.

<sup>2</sup> Report of the Meeting of the Committee of Legal Experts held at Rome on 2 and 3 November 1950, *Preparatory Work of the European Convention on Human Rights*, vol. IV, p. 1007, at p. 1010.

United Nations Commission on Human Rights (Mrs. Roosevelt). She explained her reason for opposing it as follows:

... many civil rights and obligations, such as those connected with military service and taxation, were generally determined by administrative officers rather than by courts; the original text . . . appeared to suggest that all such rights and obligations must necessarily be determined by an independent and impartial tribunal. The United States amendment would obviate such an interpretation.<sup>1</sup>

In other words, the United States' representative, from a common law country, was arguing that the wording introduced at Rome into the English text of the European Convention on Human Rights was too wide because 'civil rights and obligations' included administrative law rights and obligations! What is not known is whether the Committee of Legal Experts in Rome were aware of the history of 'civil rights and obligations' in the drafting of the United Nations Covenant when they turned to it. If they did, it could hardly be the case that they intended to limit Article 6 (1) to private law cases.

Although the preparatory work in itself is inconclusive, it is instructive in one respect. The eleventh hour alteration to the English text at Rome suggests, as the Commission contended, that whatever the intention of the signatory States was, it is best reflected in the French text, of which the English text is probably to be seen as a literal and unhelpful translation. If, therefore, the French text unequivocally carries a private law meaning, it would seem correct, despite the principle of the equality of the authentic texts of a treaty, to adopt its meaning, as the majority of the Commission did, rather than to attempt a marriage of both language texts, as the minority sought to do.<sup>2</sup> But, in view of the need to read it in the light of its object and purpose, is the French text clear enough to justify this approach? This is not, it is believed, a question which can be answered with conviction one way or the other. It is instead one that demonstrates the fact that the interpretation of treaties is, to some extent, an art, not a science.<sup>3</sup> One could, in company with the Strasbourg authorities, plausibly say 'yes', so that a limited, private law reading of 'droits et obligations de caractère civil' would be correct.

One could equally well conclude that there is a sufficient shadow of doubt to allow of the contrary view, so that the Convention text as a whole would have some wider meaning, perhaps that suggested by the minority of the Commission or one by which it would refer to all legal rights and obligations other than those in criminal law. An interpretation of a wider kind would be more in keeping with the spirit of the Convention. It would also avoid the use of an uncertain and somewhat irrational basis for the field of application of Article 6 (1).

<sup>1</sup> U.N. Doc. E/CN.4/SR 107, pp. 2-3. 2 June 1949. The U.S. representative first proposed that the words 'any . . . civil suit' be used instead. She later suggested 'in a suit of law', which wording was adopted.

<sup>2</sup> See Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', this *Year Book*, 37 (1961), p. 72 at pp. 82-106, and the International Law Commission Commentary on its Draft Articles on the Law of Treaties, *Yearbook of the International Law Commission* (1966-II), pp. 225-6.

<sup>3</sup> See the International Law Commission Commentary, loc. cit. (previous note), p. 218.



The distinction between private and public law is uncertain both for the reason that it varies a lot from one contracting party to another and because there are areas of doubt within particular legal systems.<sup>1</sup> It is irrational in the sense that the case for a 'fair hearing' in the determination of most<sup>2</sup> public law disputes is no less great than it is in the case of private law ones. One might argue in defence of the Strasbourg interpretation that the substance of the guarantee in Article 6 (1) is such that it could, and should, not apply to many decisions concerning public law rights and obligations, in particular those taken by the executive itself. The answer to this argument may be that Article 6 (1) should not be understood as controlling the executive decision-making process directly, but rather as requiring adequate provision for appeal and/or judicial review.<sup>3</sup>

#### IV. 'CIVIL RIGHTS AND OBLIGATIONS': AN AUTONOMOUS CONCEPT FOR THE PURPOSES OF ARTICLE 6 (1)

The Court's adoption of a private law meaning of 'civil rights and obligations' raises the question of the boundary between private and public law for the purposes of Article 6 (1). To answer this question, it is first necessary to consider whether a doctrine of *renvoi* applies, so that the private or public law character of the right or obligation in the legal system concerned is conclusive, or whether an autonomous Convention-meaning of 'civil rights and obligations' exists instead. This is important because, as already noted,<sup>4</sup> the precise boundary between private and public law differs from one contracting party to another.

The Court does not deal with the matter in the *Ringeisen* case. The short second paragraph in the extract from its judgment quoted above<sup>5</sup> might, at first sight, seem to do so. In fact, the Court is concerned there not with the question 'How does one classify a particular right or obligation as falling within private or public law?' but with the question 'When is a civil right or obligation (however classified) being determined?' It sees the answer to this second question in terms of the effect of the decision ('decisive for private rights and obligations') and not in terms of the municipal law classification of the rules that

<sup>1</sup> See Schlesinger, *op. cit.* (above, p. 163 n. 3), p. 347 et seq. See also Merryman, who points out (*op. cit.*, above, p. 163 n. 3, pp. 105-6) that in recent years the problem has been compounded by 'the growth of fields that defy classification as either public or private law'. He cites labour law and agrarian law as examples, and continues: 'One can say, then, that a rather drastic reshaping of the traditional conceptions of private and public law is under way in the civil law world. . . . Substantial areas remain clear. . . . But at the frontier between them there is great flux, and few sophisticated civil lawyers today would attempt any functional definition of private law or public law.' Cf. Schwelb, *loc. cit.* (above, p. 158 n. 4), p. 575, who quotes Judge Lauterpacht in the *Guardianship of Infants* case, *I.C.J. Reports*, 1958, at p. 86: 'The rights of the parties, especially in an international dispute, ought not to be determined by reference to the controversial mysteries of the distinction between private and public law.' See further, below, pp. 183-4.

<sup>2</sup> In some cases methods of control of the executive other than judicial control may be more effective or appropriate: see Bullinger, in *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Judicial Protection against the Executive*, vol. III (1971), p. 219 (English edition).

<sup>3</sup> See further, below, pp. 195 et seq.

<sup>4</sup> See above, this page.

<sup>5</sup> p. 161.



apply or of the nature of the authority taking the decision.<sup>1</sup> Nowhere else in its judgment does the Court give its reasons for deciding that the rights and obligations arising under the contract of sale in the case were a part of private law. Since they were such under Austrian law, the Court could have been referring back to that law or have been relying upon a Convention understanding of the distinction between private and public law that happened on the facts of the case to coincide with that in Austrian law.

In contrast, the Commission has ruled on the question many times and has consistently rejected the use of a doctrine of *renvoi*. The first case in which the Commission stated its position fully was A.1931/63.<sup>2</sup> There the applicant alleged that Article 6 (1) had been violated in the hearing by a professional body of his claim to be enrolled as a probationer barrister (*Rechtsanwaltsanwärter*) in Austria. As a part of his argument, the applicant alleged that a 'civil right' in the sense of Article 6 (1) was being determined because the right to choose a profession was a 'civil right' for the purpose of protection as a fundamental right in Austrian law. The Commission rejected this argument as follows:<sup>3</sup>

... there is no need to examine whether the right thus claimed constitutes a 'civil right' in Austrian law; the term 'civil rights and obligations', employed in Article 6 (1) of the Convention, cannot be construed as a mere reference to the domestic law of the High Contracting Party concerned, but on the contrary, relates to an autonomous concept which must be interpreted independently of the rights existing in the law of the High Contracting Parties, even though the general principles of the domestic law of the High Contracting Parties must necessarily be taken into consideration in any such interpretation.

The Commission then decided that the right to be enrolled as a barrister was not a 'civil right' in the sense of the autonomous concept in Article 6 (1). It has consistently followed the same 'autonomous' approach since then.<sup>4</sup>

Although the Court did not expressly consider the present question in the *Ringeisen* case, it would be surprising if it were not to agree with the Commission's approach. The Court has adopted an autonomous meaning of the concept of a criminal 'charge' in Article 6 (1).<sup>5</sup> Not to do so in respect of 'civil rights and obligations' would mean that the Convention would have a different scope from one contracting party to another in a context in which a common

<sup>1</sup> See further, below, p. 185.

<sup>2</sup> *Y.B.E.C.H.R.*, 7 (1964), p. 212. See also the earlier decision in *Isop v. Austria*, A.808/60, *Y.B.E.C.H.R.*, 5 (1962), p. 108, in which the Commission held that 'civil rights and obligations' must be interpreted by reference to the nature of the right and not the forum set for its determination by the local law. In applying this 'substantive' approach, the Commission seemed to adopt an autonomous approach to 'civil rights and obligations' rather than one that looked to Austrian law.

<sup>3</sup> *Ibid.*, p. 222.

<sup>4</sup> See A.2145/64, *Y.B.E.C.H.R.*, 8 (1965), p. 282 at p. 312; A.3134/67, etc., *ibid.*, 11 (1968), p. 528 at p. 562; A.3959/69, *C.D.E.C.H.R.*, 35 (1970), p. 109 at p. 112; the view of the Commission in the *Ringeisen* case, *Pleadings*, pp. 69 (report), 229 and 237 (public hearings); A.4523/70, *C.D.E.C.H.R.*, 38 (1971), p. 115; A.4505/70, *Y.B.E.C.H.R.*, 14 (1971), p. 522; A.4618/70, *C.D.E.C.H.R.*, 40 (1972), p. 11.

<sup>5</sup> See the *Wemhoff* case, *Judgment* (above, p. 173 n. 4), p. 26. Cf. the Report of the Commission in the *Soltikow* case, extract in *Y.B.E.C.H.R.*, 14 (1971), p. 868. See also Mr. Fawcett (for the minority of the Commission) in the public hearings in the *Ringeisen* case, *Pleadings*, p. 238.

European standard is desirable. Moreover, a Convention meaning of 'civil rights and obligations' would, in any event, have to be developed for those contracting parties whose legal systems do not make use of a private law-public law classification in practice.<sup>1</sup>

But this still leaves the question of the meaning to be given to 'civil rights and obligations' in Article 6. Surprisingly, there is, even now, virtually no discussion of this question in the Commission's jurisprudence. It may be hoped that the arrival, in 1974, of France as a party to the Convention, with a resulting important increase in the legal systems to be accommodated in the application of an autonomous concept of 'civil rights and obligations', will cause the Commission to consider more fully in its decisions its reasons for classifying rights and obligations as public or private. There is no case as yet in which the Commission has expressly compared and chosen between two different municipal law approaches. In the early case of A.1092/61,<sup>2</sup> the Commission was faced with a claim under Article 6 (1) concerning proceedings before a civil court in Austria in which the applicant had sought damages in tort against a *land* Government for negligent treatment in a public hospital. The Commission declared the application inadmissible. It did so by reference to the substance of the guarantee in Article 6 (1). It did not expressly consider whether a 'civil right' was being determined. Possibly it did not consider the question. If it did, and assumed that a 'civil right' was being determined, the Commission did so, intentionally or otherwise, consistently with the German approach to the classification of tort claims for damages against the State (*viz.* a matter of private law), which happened also to be that of Austria, whose law is based upon German law in this matter.<sup>3</sup>

The only clear indication that the Commission has given of its approach has been its statements, when affirming that a doctrine of *renvoi* is not to be applied, that none the less 'the general principles of the domestic law of the High Contracting Parties must necessarily be taken into consideration'.<sup>4</sup> This is so, presumably, because these principles can be taken to have been in mind when the phrase 'civil rights and obligations' was adopted. This is a reasonable assumption, although, strictly speaking, it is one that relates to the general principles of the law of the original signatory States which participated in the drafting of

<sup>1</sup> See below, p. 183.

<sup>2</sup> *Loc. cit.* at p. 16 n. 5.

<sup>3</sup> One might be tempted to believe that the Commission was influenced by the fact that the case was actually being heard by an 'ordinary' court. The case was decided, however, just after *Isop v. Austria*, A.808/60, *Y.B.E.C.H.R.*, 5 (1962), p. 108, in which the Commission emphatically rejected a 'forum' approach to the definition of 'civil rights and obligations'. Note that the decision in A.1092/61 would make sense in English law; it would be odd if claims against the Government in contract or tort in English law in the ordinary courts were not controlled by Article 6 (1) when such claims against private persons were. See, in this connection, A.4798/71, *C.D.E.C.H.R.*, 40 (1972), p. 31. Although the question was not discussed in that case, the Commission seemed inclined to agree that an English County Court claim for wrongful dismissal by a teacher in a *state* school involved the determination of a 'civil right'. Cf. the observations of Lord Wilberforce in *Malloch v. Aberdeen Corporation*, [1971] 1 W.L.R. 1578.

<sup>4</sup> See A.1931/63, *Y.B.E.C.H.R.*, 7 (1964), p. 212 at p. 222; A.3134/67, etc., *ibid.*, 11 (1968), p. 528 at p. 562; A.3959/69, *C.D.E.C.H.R.*, 35 (1970), p. 109 at p. 112; and the view of the Commission in the *Ringeisen* case, *Pleadings*, pp. 69 (report) and 229 (public hearings).



the Convention, not the present contracting parties.<sup>1</sup> In fact, the identity of the two groups of the States is such that this makes little or no difference.

The problem about using 'general principles' of this sort is twofold. Firstly, the distinction between private and public law is not as well developed in the law of some contracting parties as it is in that of others. This is particularly true of the common law and common law-influenced systems in the United Kingdom and Ireland. It has no practical significance in these systems and is not formally a part of the law at all. None the less, the distinction is occasionally relied upon by common law writers for purposes of classification<sup>2</sup> and is discussed in some books on jurisprudence in the common law world.<sup>3</sup> The understanding of the distinction to be found in these sources is essentially that found in civil law systems also, viz. that private law concerns the relations of private persons in their relations *inter se* and public law concerns the State.<sup>4</sup> If recourse is had to them, they will, therefore, so far as they go and subject to what is said in the next paragraph, lead to conclusions not out of step with those to be derived from the 'general principles' in the law of those contracting parties in which there are more developed concepts of private and public law.

The second aspect of the problem is a little more difficult to resolve. When it comes to particular cases, civil law systems do not always classify a given subject in the same way.<sup>5</sup> Thus, in French law claims against the State in tort for damages are regarded as falling within public law for jurisdictional purposes and so are heard by the administrative courts; in West German law they are treated as part of private law, determinable by the ordinary courts.<sup>6</sup> Similarly, the former uses a test of administrative contract which means that more claims against the State in contract for damages are public law claims, determinable by administrative tribunals applying special rules as to liability for breach, than is the case with the latter.<sup>7</sup> Social security law also presents a problem. It is treated as a part of public law for jurisdictional purposes in German law.<sup>8</sup> In French law, most tribunals applying it are regarded as applying private law (so that they are subject to the control of the Cour de Cassation, not the Conseil d'Etat).<sup>9</sup> There are also branches of law, particularly new ones, such as labour law, that are generally found difficult to classify and bear characteristics of both private and

<sup>1</sup> Cf. the preamble to the Convention (fifth part). Similar assumptions have been made by the Court in earlier cases: see the *Wemhoff* case, *Judgment* (above, p. 173 n. 4), p. 23, and the *Vagrancy* cases, *European Court of Human Rights*, judgment of 18 June 1971, pp. 42, 45. The Court refers variously in these judgments to the 'contracting States' and the 'member States of the Council of Europe'.

<sup>2</sup> See, e.g., Borrie, *Public Law*, 2nd edn. (1970).

<sup>3</sup> See, e.g., Paton, *Jurisprudence*, 4th edn. (1972), pp. 326-30.

<sup>4</sup> See the references cited above, p. 163 n. 3, and *Buergenthal I*, loc. cit. (above, p. 158 n. 4), p. 45.

<sup>5</sup> Cf. above, p. 180.

<sup>6</sup> See Schlesinger, op. cit. (above, p. 163 n. 3), pp. 351-8.

<sup>7</sup> The German approach is to look to the 'essential nature of the legal relationship between the parties' (Schlesinger, op. cit. (above, p. 163 n. 3), p. 359); the French approach is a more pragmatic one which, to a large extent, leaves the decision whether the contract is an administrative one with the administration (Brown and Garner, *French Administrative Law*, 2nd edn. (1973), pp. 67-8).

<sup>8</sup> Cohn, op. cit. (above, p. 163 n. 3), p. 7.

<sup>9</sup> Brown and Garner, op. cit. (above, n. 7), p. 26. Note that the Commission has ruled that social security law is a part of public law for the purposes of Article 6 (1): see above, p. 165.



public law.<sup>1</sup> Clearly in such cases<sup>2</sup> the 'general principles' common to the law of the contracting parties are of limited help. A comparable problem has arisen for the Court of the European Communities. In several contexts it has had to rely upon the general principles of the law of the member States. In doing so, its approach has been 'not . . . simply to draw on more or less arithmetical averages . . . between the different national solutions, but . . . to . . . choose from each of the member-States those solutions which, having regard to the object of the Treaty, appear to it to be the best or the most progressive'.<sup>3</sup> A similar emphasis upon the object and purpose of the European Convention would be appropriate in the present context.

#### V. THE MEANING OF 'DETERMINATION'

It was here that the Court parted company with the Commission. In its jurisprudence before the *Ringeisen* case, the latter had taken the view that 'civil rights and obligations' were being determined only when they were *directly* in issue in proceedings to which Article 6 (1) otherwise applied.<sup>4</sup> Thus, in A.2145/64, when the Commission rejected a complaint under Article 6 (1) because it concerned the assessment of a tax, and hence of a public law obligation, it noted:

. . . the rights and obligations on which the *députation permanente* of Brabant had to rule related to fiscal law, a branch of public law, and not to private law; . . . therefore, Article 6 (1) of the Convention was not applicable in this case, although the fiscal measure attacked had repercussions on a taxpayer's property rights.<sup>5</sup>

Similarly, in the *Ringeisen* case itself, the Commission was of the opinion that Article 6 (1) did not apply because the question directly under consideration by the Regional Commission was one of public law, viz. whether the State should approve the sale or not.<sup>6</sup>

<sup>1</sup> Cf. Merryman (above, p. 163 n. 3).

<sup>2</sup> Note also that despite the undeveloped nature of thinking in common law systems on the division between public and private law, one can also see certain disparities between English law and, for example, French law. Whereas rent tribunals would almost certainly be thought to be administering public law by an English lawyer, they are treated as administering private law in French law: see Brown and Garner, *op. cit.* (above, p. 183 n. 7), p. 26. In contrast, disciplinary tribunals dealing with doctors and other professions (*except the legal profession*) are classified as 'administrative' tribunals in French law: Brown and Garner, *op. cit.*, p. 26; in English law they are considered 'domestic' tribunals, applying, probably (if the question were ever to arise), private law. The Commission has treated all disciplinary proceedings (*including those concerning lawyers*) as public law proceedings: see above, p. 166.

<sup>3</sup> Advocate General Lagrange in *Koninklijke Nederlandse Hoogovens en Staalfabrieken NV. v. High Authority*, *Recueil de la jurisprudence*, 8 (1962), p. 485 at p. 539; *Common Market Law Reports*, 1963, p. 73 at pp. 85-6. See also Lorenz, 'General Principles of Law: their elaboration in the Court of Justice of the European Communities', *American Journal of Comparative Law*, 13 (1964), p. 1.

<sup>4</sup> An exception to this is the *Alam and Khan* line of cases, as to which see above, pp. 167 et seq.

<sup>5</sup> *Y.B.E.C.H.R.*, 8 (1965), p. 282 at p. 312. Italics added. See also A.1904/63, etc., *ibid.*, 9 (1966), p. 268 at p. 284; A.2248/64, *ibid.*, 10 (1968), p. 170 at p. 176; A.2552/65, *C.D.E.C.H.R.*, 26 (1967), p. 1 at p. 8; A.3134/67, etc., *Y.B.E.C.H.R.*, 11 (1968), p. 528 at p. 562 (passage quoted above, p. 164).

<sup>6</sup> *Ringeisen* case, *Pleadings*, pp. 69-72.

The Court has taken a wider view. It has ruled that a 'civil right' or 'obligation' is being determined whenever a decision is taken which is, either directly or indirectly, decisive for it. Article 6 therefore applied to the *Ringeisen* case because the Regional Commission's ruling was indirectly decisive for the applicant's private law rights under the contract of sale which he had made. To repeat the key passage in the Court's judgment,

although it was applying rules of administrative law, the Regional Commission's decision was to be decisive for the relations in civil law ('de caractère civil') between *Ringeisen* and the Roth couple.<sup>1</sup>

A consequence of the Commission's approach before the Court's ruling in the *Ringeisen* case was that Article 6 (1) could only exceptionally apply to decision-making by the executive or by administrative or other special courts or tribunals because the great majority of decisions directly bearing upon private law rights and obligations are made by the ordinary courts.<sup>2</sup> The Court's interpretation of 'determination' means that despite its adoption of the Commission's narrow, private law reading of 'civil rights and obligations', Article 6 (1) can apply more commonly to such decision-making than it could under the Commission's pre-*Ringeisen* interpretation.

But in exactly what kinds of cases Article 6 (1) does apply in accordance with the *Ringeisen* case remains to be established. On its facts, the *Ringeisen* case was one in which a private law transfer of an interest in land was subject to approval by a body which would in English law be called an administrative tribunal. A comparable case is found in Scottish law in the rule that an assignment by a crofter of his interest in a croft has to be approved by the Crofters' Commission.<sup>3</sup> As in the *Ringeisen* case, any assignment without the approval required by statute is null and void.<sup>4</sup> Although the interest of the crofter is less than one of ownership, it seems probable that the *Ringeisen* case would apply. Equally, it would surely not matter that a case did not concern the transfer of an interest in land; any case involving the public control of land, it is submitted, would come within the *Ringeisen* case. Suppose, under English law, X agrees with Y, a builder, that Y shall build a commercial garage for X on his, X's, land on condition that X manages to obtain planning permission. Planning permission is then sought by X and refused by the planning authority.<sup>5</sup> An appeal to a Ministry Inspector is unsuccessful. X now seeks to argue a violation of Article 6 (1) in the conduct of the inquiry by the inspector. Although the refusal of planning permission does not, in contrast with the decision of the Regional Commission in the *Ringeisen* case, render the building contract void under English planning law, it is

<sup>1</sup> *Ringeisen* case, *Judgment*, p. 39. The Court would appear to have been influenced by the argument of the minority of the Commission on this point: see *Ringeisen* case, *Pleadings*, p. 244.

<sup>2</sup> For the Commission's approach where a private law determination did lie in the hands of the executive, see A.1329/62, discussed below, p. 188. Note that by 'private law' in the statement in the text is meant 'private law' according to the autonomous concept developed for the purpose of Article 6 (1). A legal system out of step with the Commission may find that a greater or lesser proportion of 'civil rights and obligations' are, in its legal system, determinable by public law institutions.

<sup>3</sup> S. 8 (1), Crofters (Scotland) Act, 1955.

<sup>4</sup> *Ibid.*, s. 8 (5).

<sup>5</sup> See Town and Country Planning Act, 1971, ss. 23, 25, 26.



none the less as decisive for the private law contractual rights and obligations involved because the contract will fail because the condition is not met.<sup>1</sup>

Since public control of the use of land is so extensive in the law of the contracting parties,<sup>2</sup> the application of the *Ringeisen* case just within that branch of administrative law would be quite significant. It is difficult to see, however, why the *Ringeisen* case should apply only to cases involving public control of the use of land. There would seem to be nothing in the reasoning of the Court to indicate that it should not extend to a decision in any public law field which is indirectly determinative of a private law right or obligation. Thus, in English law, a decision by an immigration appeal tribunal to confirm an immigration official's refusal to allow an alien to enter the United Kingdom<sup>3</sup> might be decisive for such rights as the alien may have under a private law contract of employment requiring his presence in the United Kingdom. To take another example, a tenant of furnished accommodation may, in English law, question his rent before a rent tribunal.<sup>4</sup> Its decision would be indirectly decisive for the rights and obligations of the parties to the tenancy agreement. This second hypothetical case differs from the *Ringeisen* case in one respect. In the *Ringeisen* case, the parties to the contract could not as a matter of law, either jointly or unilaterally, have avoided the public law decision that was crucial for their private law relations. In the above hypothetical case, this is not so; it would be decisive only because one of the parties takes action that makes it such. It is difficult to see that this should be a meaningful distinction: it does not seem equitable that the application or non-application of a 'fair trial' guarantee should depend upon the fact that one or both of the parties to a contract has or have initiated the proceedings.

It is submitted further that there is no good reason to limit the *Ringeisen* case to cases involving contractual private law rights. If it is not so limited, it would not have mattered, for example, that the assignment of land in the *Ringeisen* case had been by gift rather than contract. Similarly, in English law, a decision by a mental health review tribunal to refuse to release a person detained as a mental patient<sup>5</sup> would be subject to Article 6 (1) because it could, in some cases, be decisive for the patient's rights in a divorce action brought against him by his spouse.<sup>6</sup> There are also many public law decisions that affect a person's

<sup>1</sup> For a recent case with somewhat similar facts, see *Heron Garage Properties v. Moss*, [1974] 1 W.L.R. 148. Note that the hypothetical case in the text above differs from the *Ringeisen* case in that the decision in question—that by the Ministry inspector—is taken by a member of the executive. As to the significance of this, see Section VI, below.

<sup>2</sup> As to the transfer of land, the Austrian Government claimed in the *Ringeisen* case: 'We find similar regulations in most European States, which are now making the transfer of landed property subject to official approval in order to prevent the land passing into the hands of aliens or . . . to maintain a healthy farming population': *Ringeisen* case, *Pleadings*, p. 203. As to public control of land generally, see the Commission, *ibid.*, p. 233.

<sup>3</sup> See Immigration Act, 1971, ss. 3, 4, 13, 20.

<sup>4</sup> See Rent Act, 1968, ss. 72–3. Note that in English law, though apparently not in French law, the tribunal would probably be thought to be applying public law: see above, p. 184 n. 2.

<sup>5</sup> Mental Health Act, 1959, s. 123.

<sup>6</sup> See ss. 1 and 2 (1) (e), Divorce Reform Act, 1969, and *Santos v. Santos*, [1972] Fam. 247. The same decision would also be determinative of the detained person's rights in the law of tort



property rights *in rem*. Decisions concerning the compulsory purchase of land are examples. So are rulings on questions of taxation and of social security contributions or benefits. It is interesting to note that the Commission has considered in several cases the question whether public law decisions come within Article 6 (1) because they affect private law property rights *in rem*, and has decided that they do not.<sup>1</sup> Whether the Court has intended to disagree with the Commission on this point is not clear. If the Court's basic principle is correct it is not an impossible jump from rights *in personam* to rights *in rem*. At the same time, it is arguable that to apply the *Ringeisen* case so widely would come close to undermining the private law meaning of 'civil rights and obligations' adopted by the Court. It is interesting to note that in at least one case the Commission has not understood the *Ringeisen* case in this wide sense. In A.5421/72,<sup>2</sup> it did not apply the *Ringeisen* case to a decision by the Belgian fiscal authorities on a matter of revenue law. In doing so, the Commission repeated the statement that it had made in A.2145/64<sup>3</sup> that revenue law, as public law, fell outside Article 6 (1) even though the ruling in question had an effect upon private law property rights and obligations.<sup>4</sup>

The Court talks of a decision being 'decisive' for civil law rights and duties. Public law decisions which are relevant but not 'decisive' are, it would seem, not included. In English law, for example, if an inquiry under the Civil Aviation Act, 1949,<sup>5</sup> were to find negligence on the part of an airline, this would be relevant but not conclusive in any civil proceedings in tort brought against it. Similarly, if a person is declared a patient under the Mental Health Act, 1959, this public law decision would be relevant to his private law right to make a will, but not decisive.<sup>6</sup> A separate question arising from the Court's use of the word 'decisive' concerns interlocutory proceedings. It is to be hoped that certain of these (e.g. those leading to an interim injunction or ruling that a particular defence is not available) will not be treated as not being 'decisive' for private law rights and obligations in the sense of the Court's judgment.<sup>7</sup>

in respect of false imprisonment. It may be, however, that Article 6 (1) does not apply to questions of arrest and detention as such; it may be that Article 5 (4) of the Convention (for text, see above, p. 170 n. 6) applies exclusively instead. This matter was argued, but left open by the Court, in the *Vagrancy Cases*, judgment of 18 June 1971, p. 44.

<sup>1</sup> See, e.g., the quotations from A.3134/67 (above, p. 164) and A.2145/64 (above, p. 184).

<sup>2</sup> *C.D.E.C.H.R.*, 43 (1973), p. 94.

<sup>3</sup> *Y.B.E.C.H.R.*, 8 (1965), p. 282.

<sup>4</sup> In A.5428/72, *C.D.E.C.H.R.*, 44 (1973), p. 49, the Commission rejected a claim concerning proceedings before the Hamburg Administrative Court of Appeal in respect of a decision by the planning authorities to widen the street upon which his property was situated. The Commission distinguished the *Ringeisen* case on the ground that 'in the present case, the public authorities did not determine, nor did they interfere with, any legal relationship existing between the applicant and a third person . . .': *ibid.*, p. 52. It is interesting that the Commission emphasized that the applicant was complaining of the administrative act by which it was decided to widen the street and not any later decision to expropriate his property. It seemed inclined to accept that in the latter case Article 6 (1) might apply. <sup>5</sup> S. 10.

<sup>6</sup> See *Nicholls v. Binns*, (1858) 1 Sw. & Tr. 239. The Mental Health Act, 1959, has not affected the law on this point: see Fridman, *Law Quarterly Review*, 79 (1963), p. 502 at p. 505.

<sup>7</sup> Note, in this connection, a criticism of the practice in the Queen's Bench Division of the English High Court of hearing interlocutory applications *in private*: Staveley, *New Law Journal*, 124 (1974), p. 764.

By its interpretation of 'determination', the Court has thus extended the field of application of Article 6 (1) to administrative law to some extent. Exactly to what extent remains to be clarified. What is clear is that the relevant criterion is a curious one: Article 6 (1) applies when it so happens that the proceedings are decisive for private law rights and obligations. Whatever the signatory States intended, it is unlikely that they proposed to make the application of Article 6 (1) to the functioning of administrative courts and other special courts and tribunals and, perhaps, of the executive turn upon such an arbitrary fact. Although the Court has in this way managed to bring some administrative law decision-making within the purview of Article 6 (1), it could, it is believed, have done this more rationally by a wider reading of 'civil rights and obligations'. It would make little sense, for example, for proceedings before a British immigration appeals tribunal to be subject to Article 6 (1) if its decision to refuse admission to an alien were crucial for a contract of employment that the alien had, but to be beyond its scope if it were not. It would make little sense, that is, unless one gave a questionable preference to private law rights and obligations over public law ones. The problems of applying Article 6 (1) to institutions other than the ordinary courts do not differ according to whether a determination is decisive for private law rights or obligations. A more important distinction in this respect is between decision-making by the executive and by bodies independent of it.<sup>1</sup>

#### VI. A 'DETERMINATION' BY WHOM?

##### (i) *The view of the Commission*

(a) *A.1329/62*: Article 6 (1) applicable only to 'determinations' by 'courts of law'. The final question to consider is one that has been hinted at in the preceding section, namely whether, in accordance with the Court's decision, Article 6 (1) applies when a determination is made which is directly or indirectly decisive for private law rights and obligations *irrespective of the identity of the decision-maker*. Above all, does it apply to determinations made by members of the executive so that they have to comply with the precise court-like requirements of Article 6 (1) when taking their decisions? This is a question that faced the Commission more than once before the Court's judgment in the *Ringeisen* case was delivered, and it may be helpful to examine the way in which the Commission tackled it before the judgment in that case is discussed.

The leading case was decided by the Commission in 1962. In *A.1329/62*,<sup>2</sup> the applicant complained that a discretionary decision by the Danish Ministry of Justice to suspend her right of access to the children of her former marriage was taken in violation of Article 6. The Commission ruled that Article 6 did not apply to the case. In doing so, it stated:

... insofar as the Applicant alleges a violation of Article 6 of the Convention, it is to be observed that this Article applies only to proceedings before courts of law; whereas the decision taken by the Ministry of Justice to suspend the Applicant's right of access

<sup>1</sup> See further below, pp. 195 et seq.

<sup>2</sup> *Y.B.E.C.H.R.*, 5 (1962), p. 200.

to her children is an administrative decision, solely within the competence of that Ministry, whereas, the Convention, under the terms of Article I guarantees only the rights and freedoms set forth in Section I of the Convention and under Article 25, paragraph (1) only the alleged violation of one of those rights and freedoms by a Contracting Party can be the subject of an application to the Commission; whereas the right to have a purely administrative decision based upon proceedings comparable to those prescribed by Article 6 for proceedings in court is not as such included among the rights and freedoms guaranteed by the Convention; whereas it follows that this part of the Application is incompatible with the provisions of the Convention and must be rejected in accordance with Article 27, paragraph (2) of the Convention.<sup>1</sup>

The Commission did not expressly consider whether the case concerned a 'civil right' in the sense of Article 6 (1). It is reasonable to suppose from its earlier jurisprudence that, had the Commission thought that it did not, it would have rejected the application on that basis. As noted earlier,<sup>2</sup> the Commission had then already in another case acted on the basis that the right of access to one's children is a 'civil right';<sup>3</sup> moreover, such rights are usually treated as a part of private law in civil law systems.<sup>4</sup> If, as thus appears, the case concerned a 'civil right', the Commission was faced squarely with the question whether Article 6 (1) is applicable to decision-making by the executive. Does Article 6 (1), with its requirement, *inter alia*, of a hearing by a 'tribunal', apply whenever 'civil rights and obligations' are being determined, or does it do so only when they are being determined in proceedings that are, in a way to be defined, basically court-like to start with? Since most determinations that are *directly* decisive for 'civil rights and obligations' (which were, in the Commission's view at that time, the only determinations subject to Article 6 (1)) are taken by 'courts of law', it is not surprising that this was a question which had not been decided by the Commission before. Now, when confronted with it, the Commission opted, it has generally been supposed,<sup>5</sup> for a limited, 'forum' reading of Article 6 (1).

The exact extent of this reading is not clear. The case concerned a decision taken by the executive. The Commission states that Article 6 (1) applies to proceedings before 'courts of law'. These undoubtedly include the 'ordinary courts'; the question is whether they also include other courts and tribunals independent of the executive. In A.1013/61,<sup>6</sup> which was decided just before A.1329/62, the Commission assumed without discussion that Article 6 (1) applied to a West German labour court (*Arbeitsgericht*), which is a special court in the West German legal system distinct from the 'ordinary courts'. It would seem likely that other special courts, such as administrative courts, revenue courts, etc., typical of civil law systems, as well as administrative tribunals of the common law kind would be covered too. The problem before the Commission in A.1329/62 was that decision-making by the executive is usually not subject to formal, court-like proceedings in which both sides argue their case on equal terms. Decision-making by courts and tribunals independent of the executive

<sup>1</sup> Ibid., p. 208.

<sup>2</sup> Above, p. 166.

<sup>3</sup> A.434/58, *Y.B.E.C.H.R.*, 2 (1959), p. 354.

<sup>4</sup> See above, p. 164.

<sup>5</sup> But see the following subsection of this article.

<sup>6</sup> *Y.B.E.C.H.R.*, 5 (1962), p. 158



of the kind listed above present no such problem. Although there may be particular difficulties in applying Article 6 (1) to their proceedings,<sup>1</sup> there is no fundamental problem which might lead one to suppose that it could not have been the intention of the signatory States to control their functioning, as well as that of the ordinary courts. In practice, of course, they will normally be taking decisions that are *directly* determinative of public, not private, law rights and obligations for the purposes of Article 6 (1). In accordance with the Commission's jurisprudence before the *Ringeisen* case, therefore, the inclusion of such special courts within this scope of Article 6 (1) was not particularly important.<sup>2</sup> The *Ringeisen* case, with its inclusion of *indirect* determinations, changes this position.

(b) *The distinction between 'judicial' and 'administrative' determinations in the Scientology case.* But it is possible to interpret A.1329/62 in a different way. In the *Scientology* case<sup>3</sup> in 1968, the British Ministry of Health took certain steps to curtail the activities of an American church—the Church of Scientology—in the United Kingdom. In particular, recognition of the Church's College of Scientology as an educational establishment for the purposes of British immigration policy was withdrawn and there was a considerable tightening of immigration control over persons who had come or wanted to come to the United Kingdom to work or study at any of the Church's establishments there. The Minister's powers in this regard were discretionary. The applicant alleged a violation of Article 6 in the way in which these measures were taken. The Commission ruled that Article 6 did not apply to the case:

Whereas, it emerges clearly from the ministerial statement made in Parliament in . . . July, 1968, that the essence of the measures in issue is to refuse to the . . . College of X . . . , and all other . . . establishments, recognition as educational establishments for the purpose of the execution of Home Office policy on the admission and subsequent control of foreign nationals;

whereas the recognition of an educational establishment for the purpose just mentioned is a discretionary act by a public authority; whereas, therefore, the Commission finds that the measures introduced by the responsible Minister, as well as his refusal to hold an inquiry or to disclose evidence, are of an administrative order and do not as such involve the determination of a civil right within the meaning of Article 6, paragraph (1), of the Convention.<sup>4</sup>

<sup>1</sup> On the difficulty resulting from the fact that administrative courts and tribunals do not always sit in public, see Velu, loc. cit. (above, p. 158 n. 4). For the position in the United Kingdom, see Wraith and Hutcheson, *Administrative Tribunals* (1973), pp. 276–8, who state that 'a few tribunals always sit in public and a few always in private, leaving the majority in a middle area where they usually sit in public but where there is a certain amount of discretion to go into private session—either at the request of one of the parties or on their own determination'. Note that although the Court did not have to apply the publicity requirement to the Regional Commission in the *Ringeisen* case because of Austria's reservation to the Convention (see above, p. 160), it seemed prepared to do so if necessary.

<sup>2</sup> Exactly how important it is again depends on how closely the legal system of a particular contracting party is in agreement with the Strasbourg authorities in the line drawn between public and private law.

<sup>3</sup> A.3798/68, *Y.B.E.C.H.R.*, 12 (1969), p. 306.

<sup>4</sup> *Ibid.*, p. 316.

The case differs from A.1329/62 in that the recognition of an institution by the State as educational for immigration purposes is clearly a matter of public, not private, law. The claim under Article 6 could have been rejected on this basis. Alternatively, following the 'forum' reading of A.1329/62 discussed above, the Commission could have relied upon the fact that the decision in question was not taken by a 'court of law', even on a wide reading of that term. Instead the Commission chose to emphasize the discretionary, and hence, in its view, administrative, character of the decision taken. Because of that, there was no '*determination*' of 'civil rights and obligations' in the sense of Article 6 (1). The Commission thus adopted what might be called a 'functional', as opposed to a 'forum', approach to the meaning of '*determination*' in Article 6 (1). It read '*determination*' as limited to determinations involving the exercise of a 'judicial', as opposed to an 'administrative', function. In this context, a 'judicial' determination would seem, from the *Scientology* case, to be one that requires the application of rules of law to a factual situation; an 'administrative' one would leave the decision to the discretion of the decision-maker.<sup>1</sup>

The *Scientology* case is, however, not necessarily inconsistent with a 'forum' reading of A.1329/62. In that case too the decision of the executive was discretionary under the local law and it may be that in the *Scientology* case the Commission was stating something that is implicit in A.1329/62, viz. that Article 6 (1) only applies where the determination is made by a 'court of law' and is of a judicial character in the sense in which the term has been used above. In practice, of course, decisions by 'courts of law' on 'civil rights and obligations' will normally be 'judicial', although one can, for instance, imagine certain family law decisions taken by the courts in English law which are administrative. Alternatively, it may be that A.1329/62 itself should be read as adopting a 'functional' approach of the *Scientology* case sort. This is certainly a possible reading of the text of the Commission's decision. Although the Commission refers in the passage from its decision in A.1329/62 quoted above to 'proceedings before courts of law', and, later, to 'proceedings in court', it uses these phrases in apposition to the terms 'administrative decision' and 'purely administrative decision' respectively. Looking at the passage as a whole, therefore, the Commission moves somewhat confusingly from 'forum' to 'functional' terminology and uses the latter as much as the former. It is, therefore, at least as possible to read the passage as meaning that what the Commission had in mind when distinguishing

<sup>1</sup> A 'functional' approach had been suggested before the *Scientology* case was decided: see *Buergenthal I*, loc. cit. (above, p. 158 n. 4), p. 46. Note that Buergenthal distinguishes between the *exercise of a discretionary power*, which is an administrative function not subject to Article 6 (1), and a *challenge to its legality*, a decision as to which is a judicial one (because it involved the application of rules of law). Note also that a 'functional' approach of the *Scientology* case kind helps to explain A.2145/64, *Y.B.E.C.H.R.*, 8 (1965), p. 282. Given that the *députation permanente* is a part of the executive and that the decision taken by it was a judicial one in the sense of the *Scientology* case, it is difficult to reconcile A.2145/64 with A.1329/62 unless such an approach is adopted. Similarly, a 'functional' approach may be the best way to explain the 'immigration' cases (above, p. 167 et seq.), in which the decisions in question were taken by immigration officials. This assumes, however, that the applicants in the *Singh* case and in A.3325/67 had a *right of entry* into the U.K. (which is doubtful).



between 'proceedings in court' and a 'purely administrative decision' was the distinction between judicial and administrative decisions as it is to read it as adopting a distinction based on the identity of the body taking the decision. It has generally been understood, however, that the Commission adopted a 'forum' interpretation in A.1329/62, excluding at least decision-making by the executive and doing so whether the decision taken is a judicial or an administrative (i.e. discretionary) one. If that is so, the *Scientology* case is inconsistent with A.1329/62, unless it adds an extra requirement (the decision must be judicial) to the 'forum' one spelt out in the latter case.

(c) *The distinction between cases concerning rights and privileges.* Finally, it is interesting to note that essentially the same approach as that in the *Scientology* case can be formulated in a different way, by placing emphasis upon the words 'rights and obligations' in the phrase 'civil rights and obligations'. This was done by the applicants in the *Alam and Khan* and *Singh* cases who argued that a 'right' was being determined for the purposes of Article 6 (1) 'where upon the correct application of the law to the existing facts, [the applicant's] claim must succeed: that is where there is no residual lawful power to deprive him of what he claims'.<sup>1</sup> In other words, the presence or absence of discretion on the part of the executive went not to the nature of the 'determination' but to the question whether a 'right' was being determined. This approach would seem to have been adopted by the Commission in an earlier case, A.1760/63,<sup>2</sup> in which the Commission ruled that proceedings concerning the conditional release of a prisoner did not fall within Article 6 (1) because 'conditional release is not a "civil right" but an act of favour, the granting of which is a matter for the proper national authorities'.<sup>3</sup>

It would also seem to be implicit in the later decision of the Commission in A.4523/70,<sup>4</sup> taken immediately *after* the judgment in the *Ringeisen* case. This case concerned Article 171 of the West German Federal Compensation Act (*Bundesentschädigungsgesetz*) which provides for compensation to be paid in respect of damage suffered because of Nazi persecution, as a matter of discretion, in hardship cases where the claimant does not qualify under any other provision of the Act. The Minister of the Interior of Lower Saxony refused the applicant's claim under Article 171 for the jurisdictional reason that he considered that the applicant had not suffered the loss he complained of because of Nazi persecution, as the Act required. The applicant appealed to the Regional Court of Hanover and then to the Court of Appeal at Celle, but both confirmed the Minister's ruling that the case did not come within the Act. The applicant complained of the court proceedings relating to his claim. After quoting the Court's statement in the *Ringeisen* case that Article 6 (1) applies to 'all proceedings the result of which is decisive for private rights and obligations', the Commission continued:

... the proceedings in the present case do not even meet this test. ... The proceedings relating to such claims (under Article 171), either before the competent authorities or

<sup>1</sup> Y.B.E.C.H.R., 10 (1967), p. 494.

<sup>2</sup> Ibid., 9 (1966), p. 166 at p. 174.

<sup>3</sup> Cf. the more recent case of A.4984/71, C.D.E.C.H.R., 43 (1972), p. 28 at p. 34, in which the Commission refers to the 'privileges' of prisoners.

<sup>4</sup> Ibid., 38 (1971), p. 115.



subsequently before the courts, . . . concern the exercise by the Government of a discretionary power . . . The present applicant was refused compensation by the competent authorities on the ground that he was not a victim of Nazi persecution . . . and this decision was upheld by the Court of Appeal at Celle. This decision, which terminated the proceedings relating to the execution of those discretionary powers, was in no way 'decisive for private rights and obligations' within the meaning of Art. 6 (1) of the Convention.

The Commission here seemed to be saying that the proceedings were not 'decisive for private rights and obligations' because no *right* was being determined, only a privilege.<sup>1</sup> What is interesting also is that the Commission took this view even though the proceedings challenged were not those, such as may have occurred, before the Minister of the Interior, but those before the ordinary courts of law. This is consistent with the 'substantive' approach to the definition of 'civil rights and obligations' adopted by it in *Isop v. Austria*.<sup>2</sup> The ruling in A.4523/70 must, however, be contrasted with those in two other West German compensation cases decided before the *Ringeisen* case: A.2942/66<sup>3</sup> and A.4304/69.<sup>4</sup> In both of these, *rights* to compensation were in issue, not privileges; the decisions of the competent authorities, which were a part of the executive, were thus judicial, not administrative. In both cases, the Commission applied A.1329/62, thus adopting a 'forum', not a 'functional', reading of that case.<sup>5</sup>

## (ii) *The view of the Court*

Turning to the *Ringeisen* case, the second paragraph of the extract from the Court's judgment quoted above<sup>6</sup> is the relevant part. To repeat it in full,

The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence.

This suggests a wide reading of Article 6 (1) so that it applies whenever 'civil

<sup>1</sup> Note that the Commission did not distinguish between a decision as to a jurisdictional fact, such as that which was actually taken (i.e. that the applicant was not eligible for compensation), and a decision applying the discretionary power to allow compensation in a hardship case. The former kind of decision might be said to be judicial, or to involve the determination of a 'right' (cf. *Buergethal I*, above, p. 158 n. 4), though probably not a private law right.

<sup>2</sup> Above, p. 162.

<sup>3</sup> *C.D.E.C.H.R.*, 23 (1967), p. 51 ('. . . proceedings before an administrative authority, such as the Equalisation Board, fall outside the scope of Article 6 . . .': *ibid.*, p. 59).

<sup>4</sup> *Ibid.*, 36 (1970), p. 76. Note that in A.4304/69 the applicant took his claims to compensation to the West German courts and complained of their functioning as well as of that of the administrative authorities. Although it found no substance in this complaint either, the Commission appeared to accept it as coming within Article 6 (1), presumably because the claims were in this case brought before 'courts of law'. Note that the Commission here would appear to have assumed that private law rights were involved (in neither A.2942/66 nor A.4304/69 was the private law-public law question discussed). But see *contra* the later decisions of the Commission cited above, p. 166 n. 8.

<sup>5</sup> Cf. the judgment of 24 June 1966 of the Belgian Conseil d'Etat cited in Velu, *American Journal of Comparative Law*, 18 (1970), p. 259 at p. 270. See also A.4038/69, *Y.B.E.C.H.R.*, 13 (1970), p. 250, which applies A.1329/62, but which is consistent with both of the two interpretations of that case discussed above.

<sup>6</sup> p. 6.

rights and obligations' are being determined, even if the determination is by the executive.<sup>1</sup> Such a reading is inconsistent with the decision of the Commission in A.1329/62. It is supported in another part of the text of the Court's judgment where the Court decided that Austria's reservation to the Convention concerning the public nature of proceedings applies not only to the ordinary courts in Austria but also to the Regional Commission. In doing so, it stated,

. . . the reservation covers *a fortiori* proceedings before administrative authorities where their subject matter is the determination of civil rights and obligations and where, therefore, the said authorities are considered to be tribunals within the meaning of Article 6, paragraph (1).<sup>2</sup>

Supposing that the 'administrative authorities' in this passage (*autorités administratives* in the French text) include authorities within the executive as well as those independent of it, such as the Regional Commission, the Court is talking here also in terms of a 'substantive' approach.

What is said in the passages just quoted is, of course, in common law terms, *obiter dicta*. In the *Ringeisen* case the decision in question was taken not by the executive but by a body—the Regional Commission—independent of the executive that operated in accordance with basically court-like proceedings. As noted earlier, the Court found that the Regional Commission was a 'tribunal' in the sense of Article 6 (1) because 'it is independent of the executive and also of the parties, its members are appointed for a term of five years and the proceedings before it afford the necessary guarantees'.<sup>3</sup> One could, therefore, despite the general wording of the passage quoted from the Court's judgment, read the ruling in the case more narrowly. One could, in particular, read it so that it did not apply to decision-making by the executive. Decisions by the 'ordinary' courts and by special courts, such as administrative, labour and revenue courts, would be included, as would decisions by administrative tribunals in common law systems. This would follow from the facts of the *Ringeisen* case. Moreover, as suggested earlier when looking at the Commission's jurisprudence,<sup>4</sup> such an interpretation would, while creating particular problems, be in accord with the general practice of the contracting parties. The position concerning the executive is more difficult. It may be worth recalling certain of the guarantees in Article 6 (1) at this point. In particular, 'judgment' is to be 'pronounced publicly' and, whereas the 'trial' is normally to be held in public, 'the press and the public may be excluded from all or a part of the trial' in the public interest.<sup>5</sup> Article 6 (1) thus requires basically court-like proceedings of a sort not commonly found in the administrative law of the contracting parties in cases in which a decision has been left in the hands of the executive. In such cases, the approach is to

<sup>1</sup> This assumes that 'administrative body, etc.' (*organe administrative, etc.* in the French text) includes the executive.

<sup>2</sup> *Ringeisen* case, *Judgment*, p. 41.

<sup>3</sup> Cf. above, p. 160. On the status of the Commission in Austrian law, see Khol, loc. cit. (above, p. 158 n. 4), p. 253.

<sup>4</sup> Above, p. 189.

<sup>5</sup> Note also the use in the French text of the terms 'cause', 'contestation' and 'salle d'audience' which seem to imply proceedings before a court of law: cf. the United Kingdom Government in the *Alam and Khan* and *Singh* cases, *Y.B.E.C.H.R.*, 10 (1967), p. 478 at p. 490.

control the administration not by subjecting the executive decision-making process itself to judicial procedures but by establishing a right of appeal on the law or on the facts of the case to a court or tribunal independent of the executive or by providing at least for judicial review of the decision by such a body. This is true whether the decision taken involves the exercise of a discretionary power or the application of narrowly defined legal criteria. To insist that this approach be changed and that executive decision-making be subjected to court-like procedures could scarcely have been intended. This is so whether one is thinking of all executive decisions or only of those involving a judicial determination in the sense of the *Scientology* case<sup>1</sup> or the determination of rights as opposed to privileges.<sup>2</sup> The Court has previously, and properly, been influenced by the fundamental nature of the law of the contracting parties<sup>3</sup> in interpreting the Convention and, it is submitted, should so be influenced here. There is, arguably, also support for this view in the wording of the judgment. There the Court, in the passage quoted above, refers to 'cases (*contestations*)' and to 'proceedings'. The use of such terms is inappropriate to administrative decision-making processes and seems to assume that the function of Article 6 (1) is to control decision-making that occurs as a result of a hearing at which opposing parties to a dispute put their case.

(iii) *The application of Article 6 (1) to executive decision-making—a right of appeal or judicial review?*

It may be, then, that the *Ringeisen* case has taken only a modest step in the direction of controlling administrative justice. It may be that it should be read, that is, as applying only to the functioning of special courts or tribunals independent of the executive and applying to these only when they are taking decisions which are, directly or indirectly, crucial for private law rights and obligations. The last part of this statement is undoubtedly correct, the Court having approved the Commission's restricted 'substantive' interpretation of 'civil rights and obligations'. The first part is less certain. Not only does the Court's judgment contain wording that supports a wider reading, so that Article 6 (1) could be taken as controlling executive decision-making also, but the object and purpose of the Convention suggests this too. The trouble is to know what form that control could take. If it is accepted that Article 6 (1) cannot be taken to apply directly to the executive decision-making process, there are two other possibilities. The first is that Article 6 (1) requires contracting parties to provide a final appeal from a decision by the executive to a court or tribunal independent of it. The second is that it requires them to provide for judicial review of executive decisions.

Before examining these approaches, something should be said about the possibility that in either case Article 6 (1) would not apply to discretionary decisions by the executive. This could, following the Commission's jurisprudence, be because a judicial function is not then being exercised<sup>4</sup> or because

<sup>1</sup> See above, p. 190.

<sup>2</sup> See above, pp. 192-3.

<sup>3</sup> See the *Neumeister* case, *Judgment*, pp. 42-3.

<sup>4</sup> See the *Scientology* case, above, p. 190.



'rights' are not being determined.<sup>1</sup> A limitation upon a requirement of an appeal or judicial review of this sort is not inconsistent with the facts of the *Ringeisen* case in that the Regional Commission was undoubtedly taking a judicial decision, in the sense of the *Scientology* case, determinative of the applicant's rights. There is, however, no evidence in the Court's judgment that it was adopting such a view. It is also the case that it would limit Article 6 (1) unduly in the light of the controls actually imposed by the contracting states in their own law by way of appeal procedures or judicial review. The doctrine of *ultra vires*, for example, operates whether the decision of the executive is discretionary or not.<sup>2</sup>

Considering first the possibility that an appeal is required, Article 6 (1) could be regarded as being satisfied where a decision is taken initially by the executive if the precise list of requirements in Article 6 (1) is complied with by the body taking the final decision on the merits of the case.<sup>3</sup> This is a view which does no violence to the language of Article 6 (1); whereas the text seems to require the direct application of its provisions to the hearing of the *merits* of a case, there is nothing in it to indicate that this requirement could not be satisfied at an appellate level rather than at the stage at which the initial decision is taken. It is consistent also with the fact that a decision by the executive is in many cases more akin to a private act, the legality of which is then determined by a court of law, than to an objective determination. A hearing by an appellate body can in such cases thus be regarded as providing the first 'determination' in the case. It is also an approach which is in character with the essentials of the law of the contracting parties in that it allows a party to leave the initial decision with the executive, to be taken without Article 6 (1) being complied with, provided that there is then an appeal to a 'tribunal' in the sense of Article 6 (1) that meets the requirements of Article 6 (1) in its organization and functioning. The *Ringeisen* case, moreover, is consistent with such a reading. There an appeal was provided before a 'tribunal' in the sense of Article 6 (1) (from, in that case, a similar, independent institution), and the question raised and answered by the Court was whether this body met the precise requirements of Article 6 (1).<sup>4</sup>

<sup>1</sup> See the cases discussed above, pp. 192-3.

<sup>2</sup> It is true that in English law there has been in the past few decades closer control over the judicial or 'quasi-judicial' acts of the executive, through the rules of natural justice, than over administrative acts, but the courts are showing signs of becoming more demanding: see Garner, *Administrative Law*, 3rd edn. (1974), pp. 115 et seq.

<sup>3</sup> Cf. Van der Meersch, op. cit. (above, p. 158 n. 4), p. 372.

<sup>4</sup> When considering the effect of the Austrian reservation as to the public nature of proceedings, the Court said that it 'could have verified, even *proprio motu*, . . . whether the *District and Regional Commissions* had complied with this rule [of public hearings] . . .': *Ringeisen* case, *Judgment*, p. 40 (italics added). In so doing, it would seem to have acted on the basis that each stage of the proceedings on the merits of the case should in itself comply with Article 6 (1) and not just the final stage as suggested above. But the Court did not take this view when, also *proprio motu*, it ruled that the Regional Commission was a 'tribunal' in the sense of Article 6 (1): the status of the District Commission was not examined: see *ibid.*, p. 39. If *each* stage has to comply with Article 6 (1), the problems where the first decision is taken by the executive are, as already suggested, considerable.

If Article 6 (1), as a result of the Court's interpretation of 'determination', applies to some decisions taken initially by the executive and by administrative and other special courts and tribunals, the above approach to the problem of reconciling this fact with the fundamental nature of the legal systems of the contracting parties on the one hand and the object and purpose of the Convention on the other has much to recommend it. There are, however, difficulties. A requirement of an appeal from a decision of the executive on points of law and (especially) on the facts of a case to a 'tribunal' complying with Article 6 (1) is by no means always provided for in the law of the contracting parties at present. An interesting case is that of the United Kingdom immigration appeal tribunals. Before 1968, there was no appeal on the merits from the executive decision of the immigration officers at the port of entry. Following criticism, a reform was instituted establishing the present immigration appeal tribunals which hear appeals on the merits of the case.<sup>1</sup> These meet the requirements of Article 6 (1) and it is not unreasonable, one feels, that this should have to be so. It is tempting to argue from this example that comparable appeal procedures should be required of the contracting parties in such cases and, indeed, generally. The problem here, however, is that in some areas policy considerations are such that it is arguable that the final decision should rest with the executive. A decision as to the compulsory purchase of property for the construction of a public hospital or of a motorway might be thought to fall within this category. Article 6 (1) does not, on the face of it at least, discriminate between such cases and others, such as immigration, where policy considerations, although important in some cases, are, arguably, not such that they should be allowed to prevent an independent final decision before a 'tribunal' functioning in accordance with Article 6 (1). This, coupled with the great variety of approaches, in terms of rules and remedies, to the judicial control of the executive in the different legal systems of the parties that would have to be brought within the single guarantee of Article 6 (1), suggests that there would be great difficulties in reading that provision as requiring a right of appeal from executive decisions in all cases.<sup>2</sup>

A number of commentators have interpreted Article 6 (1) as requiring not a right of appeal but provision for judicial review of executive decisions.<sup>3</sup> The contracting parties, that is, would have to provide the possibility of recourse to a court or tribunal independent of the executive and meeting the requirements of Article 6 (1) in its procedure before which the legality of an executive decision could be challenged. The grounds for judicial review that would have to be available would, presumably, be taken from the general principles of the law of the contracting parties. This is an interpretation which would be consistent with the approach to the control of administrative action generally found in the law of the contracting parties. Although it would be less onerous than the right of

<sup>1</sup> See the Immigration Appeals Act, 1969, now replaced by the Immigration Act, 1971. See, in particular, ss. 19-20 of the latter.

<sup>2</sup> Cf. Jaenicke, *loc. cit.* (above, p. 158 n. 4), p. 311.

<sup>3</sup> See, e.g., Golsong, *loc. cit.* (above, p. 158 n. 4), p. 311.

appeal approach suggested above, which would require independent final determination of the merits of a case, it would, none the less, provide a worthwhile check on executive decision-making. But a judicial review approach also presents problems. Although more in keeping with what can reasonably be expected of the contracting parties, it, too, would meet with many exceptions in their law at the present time.<sup>1</sup> It is also more difficult to square with the text of the Convention which seems to call for the direct application of its provisions to the hearing of the merits of a case. Article 6 (1) seems to have this in mind when it refers to a 'hearing' in the 'determination' of a person's civil rights and obligations. It is difficult to see that it would be satisfied, that is, by compliance at the stage of judicial review.<sup>2</sup>

There are thus difficulties in the way of any reading of Article 6 (1) that seeks to bring executive decisions within it. These result partly from the fact that the problems of accommodating executive decision-making were not squarely faced when the text was drafted; even if the intention was to limit the scope of Article 6 (1) to private law rights and obligations, it should have been foreseen that cases would arise in which decisions concerning such rights and obligations would be taken by the executive.<sup>3</sup> They result also from the fact that the drafters of Article 6 (1) did not make up their minds between a 'substantive' and a 'forum' approach to its content. Having spelt out its field of application in 'substantive' terms (i.e. applicable to the determination of 'all civil rights and obligations'), they then proceeded to define the guarantee it contains in terms that really assume court-like proceedings. Whereas this presents no insuperable obstacle when 'civil rights and obligations' (however they are defined) are being determined by a court or tribunal independent of the executive, it does create difficulties for executive decisions. These could be lessened if the search were not one for a single rule which could be said to apply to all cases. A more flexible approach by which provision *either* for a right of appeal *or* for judicial review would be thought to comply with Article 6 (1) might be preferable.<sup>4</sup> This might be an approach of general application; alternatively, it might apply only in certain contexts (so that, for example, a right of appeal might be *required* in cases where policy considerations are not of great importance but judicial review might suffice in others).

<sup>1</sup> See the national reports in Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, *Judicial Protection Against the Executive* (1969-70), vols. I and II. Note the comment in the British report (by Bradley) that 'there are many cases where the extent of the authority's discretion much reduces or eliminates altogether the possibility of judicial review', *ibid.*, vol. I, p. 338. The British report also points out that in English law, judicial review can be excluded by statute, although the courts have recently reacted against attempts to effect this.

<sup>2</sup> Some commentators have argued against a reading of Article 6 (1) which would require judicial review of executive action by reference to Article 13: see, e.g., Jaenicke, *loc. cit.* (above, p. 158 n. 4), p. 316. The interpretation of Article 13 is a notoriously intractable problem. Fawcett's opinion that 'there is a basic confusion of thought as to the real purpose and function of the Article' (*op. cit.* (above, p. 158 n. 4), p. 232) would appear to be correct. If this is so, it would not seem profitable to base any argument as to the meaning of Article 6 (1) upon it.

<sup>3</sup> See, e.g., A.1329/62 (above, p. 188).

<sup>4</sup> Cf. the approach suggested by the minority of the Commission in the *Ringeisen* case, *Pleadings*, pp. 242-5.



## VII. CONCLUSION

The Court's judgment in the *Ringeisen* case has clarified the field of application of Article 6 (1) in several respects. It has confirmed that 'civil rights and obligations' has a 'substantive', as opposed to a 'forum', meaning, so that the concept is to be defined in terms of the nature of the rights and obligations concerned and not the institution by which they are determined. It has confirmed also that 'substantive' meaning as being one by which 'civil rights and obligations' are to be understood as being rights and obligations in private, not public, law. This restrictive interpretation was possible, but not necessary. A wider meaning consistent with the object and purpose of the Convention could have been adopted. The case does not make it clear that the concept of private law used for this purpose is an autonomous one independent of the law of the contracting parties, but it would be surprising if the Court were not to follow this, the Commission's, view of the position. The Court has widened the field of application of Article 6 (1), beyond that allowed by the Commission, in that it has established that Article 6 (1) applies when 'civil rights and obligations' are being indirectly, as well as directly, determined, although it is not yet clear how far this aspect of the Court's judgment can be carried. Nor is it clear whether Article 6 (1) applies, in one way or another, to decision-making by the executive. If it does, it cannot control such decision-making directly. The position must be instead that it requires a right of appeal to a 'tribunal' organized and functioning in accordance with Article 6 (1) and taking the final decision in the case or that it requires judicial review of the legality of executive decisions by a 'tribunal' complying with that Article. It may be, in some cases at least, that the provision of *either* of these possibilities would suffice. It may be that in others one or other remedy is specifically required.

If, as is believed, the protection of the right to a fair trial is as desirable in respect of most instances of administrative justice as it is in respect of private law cases, the result of the Court's judgment must be welcomed, as far as it goes. One can, however, criticize the fact that it brings only some, as yet undefined, kinds of administrative law cases within the protection of Article 6 (1) and that it does so on the basis of reasoning that gives an undue preference to private law rights and obligations. One must also note that, by going even so far as it has, the Court may have opened a Pandora's box; there are certainly considerable problems to be faced if the *Ringeisen* case is to be read as going beyond its facts so that it controls decision-making by the executive in some cases, either by imposing a requirement of appeal or judicial review.

In a sense, the question for the Commission and the Court now is how adventurous they are prepared to be. In the *Wemhoff* case<sup>1</sup> the Court gave a meaning to an obscure provision of the Convention (Article 5 (3)) that established, in keeping with the object and purpose of the Convention, the right of a person accused of crime to release pending trial where this was justifiable in the public interest. In the *Ringeisen* case, the Court had before it an equally

<sup>1</sup> *Judgment* (above, p. 173 n. 4).

badly drafted provision that could be the basis for a 'fair trial' guarantee in the field of administrative as well as private law which would respect the spirit of the legal systems of the contracting parties and which would also be in harmony with the object and purpose of the Convention. The Court has, in a way admittedly open to criticism, taken up this opportunity to some extent. It is to be hoped that, should another opportunity arise, it will reinforce or supplement what it has already achieved, preferably in a judgment more fully reasoned than that in the *Ringeisen* case. The alternative is a protocol to the Convention containing an article specifically directed to the problems of administrative justice. In some ways this would be preferable to what might become a thicket of case law on the part of the Commission and the Court interpreting a difficult text. But such a protocol is a distant prospect.

# THE LEGAL STRUCTURE OF ASSOCIATION AGREEMENTS WITH THE E.E.C.\*

By K. LIPSTEIN<sup>1</sup>

THE Treaty establishing the European Economic Community contemplated Association Agreements<sup>2</sup> with the non-European countries and territories which had special relations with 'Belgium, France, Italy and the Netherlands' (Art. 131 and Annex IV) and the basic terms were set out in broad outline in the Treaty (Arts. 131-5).<sup>3</sup> These provisions do not apply to countries and territories associated with the United Kingdom (Art. 227 as amended by the Act of Accession Art. 26). In addition the conclusion of Tariff and Trade Agreements, of Agreements and of Association Agreements between the Community and one or more States or an international organization were envisaged in these provisions (Arts. 113, 228, 238).

## I. TYPES OF AGREEMENTS

In practice, a much more diversified series of agreements has grown up, which has come to include the following types.

Firstly, there are Association Agreements with the original territories, formerly of a colonial or semi-independent character, belonging to the French-speaking African world, and subsequently with others in a comparable position, embodying the principles of Articles 131-5 by opening up the E.E.C. Customs territory to certain and ultimately to all of their products in return for equivalent or lesser concessions, tempered by the retention, on their part, by the newly formed States, of their right to retain or to re-impose customs duties to assist their development, industrialization or the raising of revenue;<sup>4</sup>

Secondly, similar Agreements with States in the Mediterranean basin;<sup>5</sup>

\* © Professor K. Lipstein, 1976.

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<sup>2</sup> See generally, Colliard and Manin, *Jurisclasseur de droit international*, Fasc. 164C with literature; Evrigenis, *Revue du Marché Commun*, 1966, p. 394; De Nova, *Diritto internazionale*, 25 (1971), I, p. 347 at p. 349 n. 4, with a full bibliography on Association Agreements in general, to which may be added Feld, *International Organization*, 19 (1965), p. 223; von Arnim, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 30 (1970), p. 482; Toulemon, *Revue du Marché Commun*, 1966, p. 413; Sadé, *Revue trimestrielle de droit européen*, 1968, p. 1. Luchaire, 'Les Associations à la C.E.E.', *Hague Recueil*, 144 (1975-I), pp. 247-307, could not be taken into account.

<sup>3</sup> See, e.g., Gonidel, *Annuaire français de droit international*, 1958, p. 593 and the discussion by De Nova, *Diritto internazionale*, 25 (1971), I, p. 347 at p. 354 n. 2 with extensive literature.

<sup>4</sup> Yaoundé, 20 July 1963, *Official Journal* (hereinafter O.J.) 1964, 1429; 29 July 1969, O.J. 1970 L.282/1, amended O.J. 1972 L.287/1; joined by Mauritius 12 May 1972, O.J. 1973 L.288/1 subject to the exceptions set out in Art. 2 of the Agreement; Arusha, 24 September 1969, O.J. 1970 L.282/55; Lomé, 28 February 1975, Council Reg. 119/76 L.25.

<sup>5</sup> Morocco, Reg. 1462/69, O.J. 1969 L.197/1, Reg. 868/75, O.J. 1975 L.84/12, prolonged Reg. 3416/75, O.J. 1975 L.337/4. Tunisia, Reg. 1468/69, O.J. 1969 L.198/1, Reg. 867/75, O.J. 1975 L.84/7, prolonged Reg. 3415/75, O.J. 1975 L.337/3. Malta, Reg. 492/71, O.J. 1971 L.61/1; date of entry into force: O.J. 1971 L.70/20. Cyprus, Reg. 1246/73, O.J. 1973 L.133/1; date of



Thirdly, Agreements which are unequally balanced in favour of the Associated Countries, but envisage a gradual transition into full membership in the E.E.C.;<sup>1</sup>

Fourthly, fully equal Association Agreements with E.F.T.A. countries and Iceland; and,

Finally, treaties with other countries and international organizations opening up certain tariff positions.

That was the order in which these types of agreement developed, but it will be convenient to examine, first, fully equal Association Agreements mainly concluded with E.F.T.A. countries.<sup>2</sup> These follow an identical pattern in so far as the most developed countries in Europe are concerned (Austria, Sweden, Switzerland and Finland), while those with Portugal<sup>3</sup> and Iceland<sup>4</sup> contain minor modifications.

## II. EQUAL ASSOCIATION AGREEMENTS

These Agreements are made between the E.E.C. and States, mainly belonging to E.F.T.A., which for political, not economic, reasons cannot contemplate membership.<sup>5</sup> The purpose of the Agreements coincides in its aims, though not in all of its techniques, with that of the E.E.C. (Art. 2): expansion of reciprocal trade, the harmonious development of economic relations, advance of economic activity, improvement of living and employment conditions, increased productivity, financial stability, fair conditions of competition, the removal of trade barriers and the expansion of world trade.<sup>6</sup> For this purpose the Contracting Parties agree to abide by the terms of the Agreement and to ensure its proper performance.<sup>7</sup> The range of the Agreement is defined comprehensively.<sup>8</sup> It entry into force: O.J. 1973 L.143/39. The Agreements with Sri Lanka of 22 July 1975, Reg. 2410/75, O.J. 1975 L.247/1, and with the United Mexican States of 15 July 1975, Reg. 2411/75, O.J. 1975 L.247/10 and the Treaty with Israel of 19 May 1975, O.J. 1975 L.136/8 were not taken into account.

<sup>1</sup> Greece 7 July 1961, O.J. 1963, 293, 294; Turkey 23 December 1963, O.J. 1964, 3685; Reg. 1232/71, O.J. 1971 L.130/1; Reg. 2760/72, O.J. 1972 L.293/1.

<sup>2</sup> Austria Reg. 2836/72, O.J. 1972 L.300/1; Sweden Reg. 2838/72, L.300/96; Switzerland Reg. 2840/7, L.300/188/281 (Liechtenstein); Iceland Reg. 2842/72, L.301/1; Portugal Reg. 2833/72, L.301/164 amended Reg. 881/75, O.J. 1975 L.85/1 (Protocol 8); Finland Reg. 3177/73, O.J. 1973 L.328/1; Norway Reg. 1691/73, O.J. 1973 L.171/1 all amended by a Supplementary Protocol Regs. 895/75-901/75, O.J. 1975 L.106/1-20. Similar agreements were made between the same countries and the European Coal and Steel Community; see O.J. 1973 L.350/1 (Iceland), L.350/3 (Switzerland), L.350/29 (Liechtenstein), L.350/33 (Austria), L.350/53 (Portugal) (amended Reg. 3271/75, O.J. 1975 L.325/1; Reg. 494/76, O.J. 1976 L.59/1, L.350/76 (Sweden), O.J. 1973, L.171/113; O.J. 1975 L.88/7 (Norway); these cannot be discussed here).

<sup>3</sup> Convention, Arts. 4 (4), 5 (1), (3); 15 (motor-cars), 18 and Protocol No. 8 (certain agricultural products).

<sup>4</sup> Convention, Arts. 2 (ii), 3, 5 (3), 6, 13 (2) and (3), 17 (fish).

<sup>5</sup> Koppensteiner, *Oesterreichische Juristenzeitung*, 28 (1973), p. 225. For the international aspects concerning Austria see Uhlinger, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 34 (1974), p. 365; Seidl-Hohenveldern, *Jahrbuch für Internationales Recht*, 14 (1969), p. 128. For the position of neutral countries generally in relation to the E.E.C. see Dominicié in *Mélanges Ganshof van der Meersch*, II (1972), p. 87.

<sup>6</sup> Austria Art. 1; Switzerland Art. 1; Sweden Art. 1; Finland Art. 1; Portugal Art. 1; Iceland Art. 1; Norway Art. 1.

<sup>7</sup> Austria Art. 22; Switzerland Art. 22; Sweden Art. 22; Finland Art. 22; Portugal Art. 25; Iceland Art. 23; Norway Art. 22.

<sup>8</sup> Austria Art. 2; Switzerland Art. 2; Sweden Art. 2; Finland Art. 2; Portugal Art. 2; Iceland Art. 2; Norway Art. 2.

includes uniformly all goods covered by Chapters 25–99 of the Brussels Nomenclature to the exclusion of those set out in an Annex and in Protocol 2 attached to the Agreement.<sup>1</sup> The Annex excludes from the liberation of trade albumens, natural cork, flax and hemp; and Protocol 2 lists products subject to special arrangement to take into account the cost of agricultural products incorporated therein. Leaving aside for the moment these exceptional situations and those involving trade in agricultural products and the rules of veterinary health and plant health,<sup>2</sup> the Agreements provide in general for:

### 1. *Duties and prohibitions*

- (i) a standstill on customs duties on imports in trade between the Community and the Associated State (E.E.C. Art. 2);<sup>3</sup>
- (ii) a progressive abolition of tariffs (E.E.C. Art. 13 (1)) over a period of five years at an annual rate of 20 per cent;<sup>4</sup>
- (iii) a progressive abolition of duties of a fiscal nature (E.E.C. Art. 17 (1)), while permitting either party to replace a customs duty of a fiscal nature or the fiscal element of a customs duty by an internal tax (E.E.C. Art. 17 (3), 95);<sup>5</sup>
- (iv) a standstill on charges having an effect equivalent to customs duties (E.E.C. Art. 13 (2));<sup>6</sup>
- (v) a progressive abolition of charges having an effect equivalent to customs duties (E.E.C. Art. 13 (2));<sup>7</sup>
- (vi) a standstill on customs duties on exports (E.E.C. Art. 16);<sup>8</sup>
- (vii) the abolition of existing customs duties on exports within a year after the agreement has come into effect;<sup>9</sup>
- (viii) a standstill on quantitative restrictions on imports and on measures equivalent to quantitative restrictions (E.E.C. Art. 31);<sup>10</sup>
- (ix) the abolition of quantitative restrictions on imports and of measures

<sup>1</sup> For Iceland: Protocols 2–6.

<sup>2</sup> Austria Art. 15; Switzerland Art. 15; Sweden Art. 15; Finland Art. 15; Portugal Art. 17; Iceland Art. 15; Norway Art. 15.

<sup>3</sup> Austria Art. 3 (1); Switzerland Art. 3 (1); Sweden Art. 3 (1); Finland Art. 3 (1); Portugal Art. 3 (1); Iceland Art. 3 (which includes para. 3 of Art. 5 of the other Agreements); Norway Art. 3 (1).

<sup>4</sup> Austria Art. 3 (2); Switzerland Art. 3 (2); Sweden Art. 3 (2); Finland Art. 3 (2); Portugal Art. 3 (2); Iceland Art. 3 (2); Norway Art. 3 (2).

<sup>5</sup> Austria Art. 4; Switzerland Art. 4; Sweden Art. 4; Finland Art. 4; Portugal Art. 4; Iceland Art. 5; Norway Art. 5.

<sup>6</sup> Austria Art. 6 (1); Switzerland Art. 6 (1); Sweden Art. 6 (1); Finland Art. 6 (1); Portugal Art. 6 (1); Iceland Art. 6 (1); Norway Art. 6 (1).

<sup>7</sup> Austria Art. 6 (2); Switzerland Art. 6 (2); Sweden Art. 6 (2); Finland Art. 6 (2); Portugal Art. 6 (2); Iceland Art. 6 (2); Norway Art. 6 (2).

<sup>8</sup> Austria Art. 7; Switzerland Art. 7; Sweden Art. 7; Finland Art. 7; Portugal Art. 7; Iceland Art. 7; Norway Art. 7.

<sup>9</sup> See previous note.

<sup>10</sup> Austria Art. 13 (1); Switzerland Art. 13 (1); Sweden Art. 13 (1); Finland Art. 13 (1); Portugal Art. 13 (1); Iceland Art. 13 (1); Norway Art. 13 (1).

equivalent to quantitative restrictions within a period of two years after the agreement has come into force (E.E.C. Art. 30);<sup>1</sup>

- (x) the duty to refrain from any measure or practice of an internal fiscal nature discriminating directly or indirectly between the products of the Associated States and products of the Members of the E.E.C. (E.E.C. Art. 95);<sup>2</sup>
- (xi) the duty to refrain from granting drawbacks of internal taxation in excess of the amount of direct or indirect taxation previously imposed (E.E.C. Art. 96);<sup>3</sup>
- (xii) the duty to permit payment including transfer without restrictions in respect of trade in goods between parties resident in the States, parties to the Agreement (E.E.C. Art. 68 (1));<sup>4</sup>
- (xiii) the duty not to impede the grant, repayment or acceptance of short- and medium-type credits covering commercial transactions in which a resident participates (E.E.C. Art. 68 (2));<sup>5</sup>
- (xiv) the prohibition, in so far as they may affect trade between the Contracting States, of all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition as regards the production of or trade in goods (E.E.C. Art. 85 (1));<sup>6</sup>
- (xv) the prohibition, in so far as it may affect trade between the Contracting States, of any abuse by one or more undertakings of a dominant position in the territories of the Contracting Parties as a whole or in a substantial part thereof (E.E.C. Art. 86);<sup>7</sup>
- (xvi) the prohibition, in so far as it may affect trade between the Contracting States, of public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods (E.E.C. Art. 92 (1));<sup>8</sup>
- (xvii) the prohibition of dumping (E.E.C. Art. 91).<sup>9</sup>

## 2. *Modifications of duties and prohibitions; escape clauses*

Quite generally the Association Agreements provide for the possibility that a party may establish specific rules as a result of the implementation of its agricul-

<sup>1</sup> Austria Art. 13 (2); Switzerland Art. 13 (2); Sweden Art. 13 (2); Finland Art. 13 (2); Portugal Art. 14; Iceland Art. 13; Norway Art. 13 (2).

<sup>2</sup> Austria Art. 18; Switzerland Art. 18; Sweden Art. 18; Finland Art. 18; Portugal Art. 21; Iceland Art. 19; Norway Art. 18.

<sup>3</sup> See previous note.  
<sup>4</sup> Austria Art. 19; Switzerland Art. 19; Sweden Art. 19; Finland Art. 19; Portugal Art. 22; Iceland Art. 20.

<sup>5</sup> See previous note.  
<sup>6</sup> Austria Art. 23 (1); Switzerland Art. 23 (1) (i); Sweden Art. 23 (1) (i); Finland Art. 23 (1) (i); Portugal Art. 26 (1) (i); Iceland Art. 24 (1) (i); Norway Art. 23 (1) (i).

<sup>7</sup> Austria Art. 23 (1) (ii); Switzerland Art. 23 (1) (ii); Sweden Art. 23 (1) (ii); Finland Art. 23 (1) (ii); Portugal Art. 26 (1) (ii); Iceland Art. 24 (1) (ii); Norway Art. 23 (1) (ii).

<sup>8</sup> Austria Art. 23 (1) (iii); Switzerland Art. 23 (1) (iii); Sweden Art. 23 (1) (iii); Finland Art. 23 (1) (iii); Portugal Art. 24 (1) (iii); Iceland Art. 24 (1) (iii); Norway Art. 23 (1) (iii).

<sup>9</sup> Austria Art. 25; Switzerland Art. 25; Sweden Art. 25; Finland Art. 25; Portugal Art. 28; Iceland Art. 26; Norway Art. 25.



tural policy or of any alteration in its present rules. If this should occur, the Association Agreement is to be adapted to it in accordance with the procedure laid down in it.<sup>1</sup> Similarly reservation is made in favour of the E.E.C. of the right to modify its arrangements applicable to certain petroleum products, when a common policy of origin is adopted in connection with the creation of a common energy policy.<sup>2</sup> In order to avoid a deflection of trade as a result of a proposed reduction of duties or charges having an equivalent effect applicable to third parties enjoying most-favoured-nation treatment or of their suspension, previous consultation is required.<sup>3</sup>

Naturally, as a result of concluding an Association Agreement with the E.E.C. representing all its members, the Associated State forgoes any more advantageous rights which it may have enjoyed previously as a result of a treaty with one or the other of the Member States of the E.E.C.<sup>4</sup> On the other hand, any previous arrangements arising from a customs union, free trade agreement or for frontier trade are maintained, except in so far as they conflict with the Association Agreement, especially the rules of origin (below).<sup>5</sup> As in their relations between E.E.C. countries themselves (E.E.C. Art. 36) prohibitions are permitted on imports, exports or goods in transit on grounds of public morality, public order, or public security; for the protection of life and health of humans, animals or plants; for the protection of national treasures of artistic, historic or archaeological value; for the protection of industrial or commercial property, or (in addition to those protected by Art. 36 E.E.C.) of the rules relating to gold or silver. These prohibitions and restrictions must not constitute means of arbitrary discrimination or disguised restriction of trade.<sup>6</sup>

If an increase in imports of a certain product is or is likely to be seriously detrimental to any production activity in the territory of one of the Contracting Parties, due to the reduction or abolition of customs duties and charges having an equivalent effect in respect of the product concerned *and* the duties or charges levied by the exporting country on imports of raw materials and intermediate products used in the manufacture of the product in question are significantly lower than the corresponding duties or charges levied by the importing party (cp. E.E.C. Art. 115), the party may take appropriate measures.<sup>7</sup>

If dumping is practised in trade with the other Contracting Party, the latter may take appropriate measures as provided by Art. VI of the General Agreement

<sup>1</sup> Austria Art. 10; Switzerland Art. 10; Sweden Art. 10; Finland Art. 10; Portugal Art. 10; Iceland Art. 10; Norway Art. 10.

<sup>2</sup> Austria Art. 14; Switzerland Art. 14; Sweden Art. 14; Finland Art. 14; Portugal Art. 16; Iceland Art. 14; Norway Art. 14.

<sup>3</sup> Austria Art. 12; Switzerland Art. 12; Sweden Art. 12; Finland Art. 12; Portugal Art. 13; Iceland Art. 12; Norway Art. 12.

<sup>4</sup> Austria Art. 16; Switzerland Art. 16; Sweden Art. 16; Finland Art. 16; Portugal Art. 19; Iceland Art. 16; Norway Art. 16.

<sup>5</sup> Austria Art. 17; Switzerland Art. 17; Sweden Art. 17; Finland Art. 17; Portugal Art. 20; Iceland Art. 18; Norway Art. 17.

<sup>6</sup> Austria Art. 20; Switzerland Art. 20; Sweden Art. 20; Finland Art. 20; Portugal Art. 23; Iceland Art. 21; Norway Art. 20.

<sup>7</sup> Austria Art. 24; Switzerland Art. 24; Sweden Art. 24; Finland Art. 24; Portugal Art. 27; Iceland Art. 25; Norway Art. 24.

on Tariffs and Trade.<sup>1</sup> A provision identical with the transitional provision of E.E.C. Art. 226 (1) enables a Contracting Party to take appropriate measures, if serious disturbances arise in any sector of the economy or if difficulties arise which could bring about serious deterioration in the economic situation of a region.<sup>2</sup> In addition (as in E.E.C. Art. 108 (1)), each Party, if it is in serious difficulties regarding its balance of payments or is threatened with such a difficulty, may take safeguarding measures.<sup>3</sup> Finally, following E.E.C. Art. 223, the Contracting Parties remain free to take measures to prevent the disclosure of information contrary to their security interests or which relates to trade in arms etc., or to research essential for the purposes of defence, subject to certain conditions.<sup>4</sup>

### 3. *Administrative procedure for resolving difficulties arising from Arts. 24-6*

While within the E.E.C. the Commission and the Court, and in a few instances also the Council, control the exercise of emergency measures by Member States, the grant of aids, the operation of restrictive practices, the abusive use of a dominant position and the practice of dumping, it is left to the Contracting Parties to determine unilaterally their response to any of these measures by the other Contracting Party, subject to the observance of an administrative procedure.<sup>5</sup> For this purpose a Joint Committee is established, consisting of representatives of the Community on the one hand and representatives of the Associated Country on the other hand.<sup>6</sup> It adopts its own rules of procedure and acts by mutual agreement. The chairmanship rotates among the Contracting Parties. It can make recommendations and take decisions, if the Agreement so provides. Decisions are to be enforced by the Contracting Parties in accordance with their own law. In order to enable the Committee to operate effectively, the Contracting Parties are to exchange information and to hold consultations.

Generally, any violation of the Agreement or failure to carry it out (above, p. 202 n. 7) entitles the other Contracting Party to take appropriate measures, but before doing so, the Joint Committee must be given all relevant information enabling the latter to examine the situation and to suggest an acceptable solution.<sup>7</sup> In particular in the case of restrictive practices, abuse of a dominant position or of public aids in violation of the Agreement (above, p. 204 nn. 6-8),

<sup>1</sup> Austria Art. 25; Switzerland Art. 25; Sweden Art. 25; Finland Art. 25; Portugal Art. 28; Iceland Art. 26; Norway Art. 25.

<sup>2</sup> Austria Art. 26; Switzerland Art. 26; Sweden Art. 26; Finland Art. 26; Portugal Art. 29; Iceland Art. 27; Norway Art. 26.

<sup>3</sup> Austria Art. 28; Switzerland Art. 28; Sweden Art. 28; Finland Art. 28; Portugal Art. 31; Iceland Art. 29; Norway Art. 28.

<sup>4</sup> Austria Art. 21; Switzerland Art. 21; Sweden Art. 21; Finland Art. 21; Portugal Art. 24; Iceland Art. 22; Norway Art. 21.

<sup>5</sup> Austria Arts. 27, 29-31; Switzerland Arts. 27, 29-31; Sweden Arts. 27, 29-31; Finland Arts. 27, 29-31; Portugal Arts. 30, 32-3; Iceland Arts. 29, 31-2; Norway Arts. 27, 29-31.

<sup>6</sup> For the institutional importance of these organs as part of Association Agreements see De Nova, loc. cit. (above, p. 201 n. 2), at p. 356 n. 1.

<sup>7</sup> Austria Art. 27 (2); Switzerland Art. 27 (2); Sweden Art. 27 (2); Finland Art. 27 (2); Portugal Art. 30 (2); Iceland Art. 27 (2); Norway Art. 27 (2).

either Contracting Party may refer the matter to the Joint Committee; both parties must supply all relevant information and must assist in the examination of the case. If requested by the Committee, the practice must be terminated within the time limit set by the Joint Committee. If the members of the latter do not agree on a recommendation, the complainant Contracting Party may adopt the necessary safeguarding measures, especially by withdrawing tariff concessions.<sup>1</sup> In the case of emergency measures taken by a Contracting Party because an increase of imports is seriously detrimental, or likely to be so, to domestic production in the conditions (set out above, p. 205 n. 7), the other Contracting Party must be informed and the difficulties are to be considered by the Joint Committee, which may take an appropriate decision. Failing such a decision within thirty days after the matter has been referred, the complainant Contracting Party may levy a compensatory charge on the imported product, calculated at a rate laid down by the Association Agreement;<sup>2</sup> in the case of dumping (above, p. 206 n. 1), a Contracting Party must equally inform the other party, but it must postpone any measures of redress until consultation has taken place in the Joint Committee.<sup>3</sup>

In a number of circumstances precautionary measures strictly necessary to remedy the situation may be taken by a Contracting Party if exceptional circumstances requiring immediate action make prior examination by the Joint Committee impossible. The circumstances are: generally, if serious disturbances arise or are likely to arise in a sector of the economy (above, p. 206 n. 2) or in the balance of payments (above, p. 206 n. 3); in particular, if an increase in imports of *a given product* is seriously detrimental to any active production in the importing country subject to certain additional conditions (above, p. 205 n. 7); and further, if dumping is carried out (above, p. 206 n. 1), and where export aids have a direct and immediate incidence on trade (above, p. 204 n. 8).<sup>4</sup>

A duty to inform the Joint Committee also exists if a Contracting Party wishes to reduce the level of its duties or charges having an equivalent effect applicable to third countries benefiting from most-favoured-nation treatment or is considering their suspension.<sup>5</sup> Consultation is also to take place if specific rules are established by a Contracting Party in the course of implementing or altering its agricultural policy entitling that Party to adapt the arrangements made by the Association Agreement.<sup>6</sup>

<sup>1</sup> Austria Art. 27 (3) (a); Switzerland Art. 27 (3) (a); Sweden Art. 27 (3) (a); Finland Art. 27 (3) (a); Portugal Art. 30 (3) (a); Iceland Art. 27 (3) (a); Norway Art. 27 (3) (a).

<sup>2</sup> Austria Art. 27 (1), 3 (b); Switzerland Art. 27 (1), 3 (b); Sweden Art. 27 (1), 3 (b); Finland Art. 27 (1), 3 (b); Portugal Art. 30 (1), 3 (b); Iceland Art. 27 (1), 3 (b); Norway Art. 27 (1), 3 (b).

<sup>3</sup> Austria Art. 27 (1), 3 (c); Switzerland Art. 27 (1), 3 (c); Sweden Art. 27 (1), 3 (c); Finland Art. 27 (1), 3 (c); Portugal Art. 30 (1), 3 (c); Iceland Art. 27 (1), 3 (c); Norway Art. 27 (1), 3 (c).

<sup>4</sup> Austria Art. 27 (3) (d); Switzerland Art. 27 (3) (d); Sweden Art. 27 (3) (d); Finland Art. 27 (3) (d); Portugal Art. 30 (3) (d); Iceland Art. 30 (3) (d); Norway Art. 27 (3) (d).

<sup>5</sup> Austria Art. 12; Switzerland Art. 12; Sweden Art. 12; Finland Art. 12; Portugal Art. 13; Iceland Art. 12; Norway Art. 12.

<sup>6</sup> Austria Art. 10; Switzerland Art. 10; Sweden Art. 10; Finland Art. 10; Portugal Art. 10; Iceland Art. 10; Norway Art. 10.



#### 4. *Safeguarding measures*

Since the Association Agreements envisage unilateral safeguarding measures (above, pp. 206–7 nn. 5–7, 1–4), the E.E.C. for its part has attached a Regulation setting out the procedure to be followed, if emergency measures by the Community are called for.<sup>1</sup>

In the first place the Council may either approach the Joint Committee or take measures on its own in all the situations envisaged by the Association Agreements, except where restrictive practices, abuse of a dominant position, public aids or dumping are concerned. The first two lead to an examination by the Commission, which proposes any necessary measures to be taken by the Council (Art. 2 (1)); it can do so also where the practices complained of occur within the E.E.C. and safeguarding measures are likely to be taken by the other Contracting Party (art. 2 (2)). In the case of dumping the Commission, acting by virtue of the Anti-Dumping Regulation 459/68,<sup>2</sup> can authorize safeguarding measures on its own (Art. 2). Where serious disturbances in a sector of the economy arise or threaten to arise, or where an increase in imports of a certain product is, or is likely to be, detrimental to any local production, subject to certain conditions laid down in the relevant article of the Association Agreement, the Commission makes proposals either of its own motion or upon the application of a Member State. The Council acts by virtue of E.E.C. Art. 113 (Art. 4 (1) (2)). Except in the case of export aids, Member States may impose quantitative restrictions on their own, subject to supervision by the Commission in a speedy procedure (Art. 4 (3)). An appeal lies to the Council (Art. 4 (3) fourth paragraph) and, as in E.E.C. Art. 93 (2), third paragraph, an application to have the matter decided by the Council suspends proceedings in the Commission (Art. 4 (3), paragraph 5). Naturally, the procedure concerning measures arising out of balance of payments (E.E.C. Arts. 108, 109) is maintained (Art. 5).

#### 5. *Customs duties—technical arrangements*

The range of goods for which customs duties are to be abolished is defined as covering those falling within Chapters 25–99 of the Brussels Nomenclature. This means that live animals, animal products, vegetable products, animal and vegetable fats and oils and their side products, prepared edible fats and animal and vegetable waxes, prepared foodstuffs, beverages, spirits and vinegar and tobacco, are excluded (all being agricultural products falling within the Common Agricultural Policy) (Art. 2 (1)).<sup>3</sup> To this must be added the products listed in the Annex (albumen, cork, flax and hemp) (Art. 2 (1)). A special regime is provided for products which incorporate agricultural products (Arts. 2 (a), 9 and Protocol 2); for these products the possibility is envisaged of import levies or of

<sup>1</sup> Austria, Reg. 2837/72, O.J. 1972 L.300/94; Switzerland, Reg. 2841/72, O.J. 1972 L.300/284; Sweden, Reg. 2839/72, O.J. 1972 L.300/186; Finland, Reg. 3288/73, O.J. 1973 L.338/2; Portugal, Reg. 2845/72, O.J. 1972 L.301/368; Iceland, Reg. 2843/72, O.J. 1972 L.301/162; Norway, Reg. 1692/73, O.J. 1973 L.171/103. For examples see Council Decisions 76/272–7 of 24 February 1976, O.J. 1976 L.58/7–13.

<sup>2</sup> O.J. 1968 L.93/1.

<sup>3</sup> The references are to the Convention with Austria, the provisions of which are reproduced in the Conventions with other E.F.T.A. countries.

internal price compensation measures and of export controls or levies (Protocol No. 2, Art. 1). In respect of these products a special regime of tariff reductions applies (Protocol No. 3, Arts. 2, 3). A basic duty is fixed generally (Art. 5) against which all reductions are to be measured. Again, exceptions are provided (Art. 5 (3) and Protocol No. 1) which contain special rules for the reduction of customs tariffs over a longer period (up to 1980, 1984, instead of 1977) and permit zero-tariff quotas (Protocol No. 1, Section A, Arts. 1 (3)–5 and Annexes A and B), or indicative ceilings (Protocol No. 1, Section A, Art. 3 and Annex C), above which the customs duties applicable in respect of third countries may be reintroduced.<sup>1</sup>

#### 6. *Rules of origin—surveillance*

In the absence of a common customs frontier and of a common tariff the danger exists that goods emanating from third countries might find their way into the new area made up of the E.E.C. and the Associated State, to benefit from the mutual trade concessions. In order to counter any such attempts each Association Agreement examined above contains the necessary provisions for identifying products originating in the countries of the Contracting Parties and for administrative co-operation.<sup>2</sup> Generally speaking such products must *either* be wholly obtained in the Contracting Country *or* obtained there, if in its manufacture products other than local products are used, *provided* that the products have undergone sufficient working or processing in the meaning of Art. 5 of Protocol No. 3—leaving aside products of the other Contracting Party.<sup>3</sup> Given that most of the Contracting Parties other than the E.E.C. are members of another customs grouping (E.F.T.A.), goods are considered nevertheless as originating in an E.F.T.A. country if, having been produced in one such country, they have either not undergone any working or processing in another of these countries or only such working or processing as is insufficient to qualify as local products under the general rule.<sup>4</sup> Such goods must, however, originate exclusively within E.F.T.A. countries having assumed similar obligations or, where a percentage is required to render them sufficiently worked in the

<sup>1</sup> Sweden: Council Reg. 2906/74, O.J. 1974 L.313/28; Commission Reg. 2953/75, O.J. 1975 L.293/13; Portugal: Regs. 3166/75, 3167/75, O.J. 1975 L.314/5, 6; Austria: Regs. 3227/75, 3228/75, O.J. 1975 L.320/15, 16.

<sup>2</sup> Austria Art. 11 and Protocol No. 3; Switzerland Art. 11 and Protocol No. 3; Sweden Art. 11 and Protocol No. 3; Finland Art. 11 and Protocol No. 3; Portugal Art. 11 and Protocol No. 3; Iceland Art. 11 and Protocol No. 3; Norway Art. 11 and Protocol No. 3, consolidated by Reg. 984/73, O.J. 1973 L.101/1 amended by Reg. 2995/73, O.J. 1973 L.305/1; supplemented by Joint Committee Decisions incorporated by Reg. 3353/73, O.J. 1973 L.347/12; 3420/75, O.J. 1975 L.338/1 (Austria); 3357/73, O.J. 1973 L.347/36; 3426/75, O.J. 1975 L.338/73 (Switzerland); 3356/73, O.J. 1973 L.347/30; 3425/75, O.J. 1975 L.338/61 (Sweden); 3355/73, O.J. 1973 L.347/29; 3424/75, O.J. 1975 L.338/49 (Portugal); 3354/73, O.J. 1973 L.347/18; 3422/75, O.J. 1975 L.338/25 (Iceland); 3352/73, O.J. 1973 L.347/1; 3423/75, O.J. 1975 L.338/37 (Norway); 3421/75, O.J. 1975 L.338/13 (Finland). Advance implementation: Reg. 1598/75, O.J. 1975 L.166/1; agricultural products: 1599/75, O.J. 1975 L.166/67; 3328/75, O.J. 1975 L.329/4; for overseas countries and territories: Reg. 1957/75, O.J. 1975 L.201/5.

<sup>3</sup> Austria Protocol No. 3 Art. 1; similarly Switzerland, Sweden, Finland, Portugal, Iceland, Norway.

<sup>4</sup> Protocol No. 3 Art. 2 (1).

Contracting Country, all these percentages are reached without cumulation.<sup>1</sup> Even if admissible as goods of a Contracting State by virtue of Protocol No. 3, Art. 2, such goods are not covered by the Agreement unless the value of the goods worked or processed originating in the territory of the Contracting Party represents the highest value of the products obtained.<sup>2</sup> A number of products are defined as having originated in the territory of a Contracting Party if extracted, harvested, born and raised, hunted or fished there or if they are products of such goods.<sup>3</sup> Finally, the Protocol defines what is to be understood as 'sufficient working or processing' in a country so as to make the goods or products goods originating in that territory.<sup>4</sup> Single transshipments, not split up, across a territory other than those of the E.E.C. or any one of the Associated States (E.F.T.A. and Iceland) does not affect the origin of the goods, which must be subject to a procedure of surveillance.<sup>5</sup> Detailed provisions regulate the administrative co-operation<sup>6</sup> and the supervision by the E.E.C. of imports of certain goods from the Associated States in respect of which indicative ceilings are laid down above which the customs duties applicable to third countries may be reintroduced.<sup>7</sup> The rules on the definition of the concepts of 'originating products' from the E.E.C., Austria, Finland, Iceland, Norway, Portugal, Sweden and Switzerland were consolidated for the purposes of the E.E.C. in Reg. 984/73.<sup>8</sup>

### III. MEDITERRANEAN ASSOCIATION AGREEMENTS LEADING TO FULL MEMBERSHIP<sup>9</sup>

The Association Agreements with Mediterranean countries fall into two categories: those which are transitional in their nature, since the purpose of the agreements concerned is to pave the way towards the formation of a full customs union with the E.E.C., as the Preamble to each agreement recites, and those which constitute true Association Agreements on the lines envisaged by the E.E.C. Treaty (E.E.C. Arts. 131, 228).

#### 1. *Transitional regimes*

(a) *Malta*;<sup>10</sup> *Cyprus-Scheme*. The aim of these Agreements is progressively to eliminate obstacles affecting the main body of trade between the parties.<sup>11</sup>

<sup>1</sup> Protocol No. 3 Art. 2 (1) A (b), B (b); and see the exceptions in Art. 2 (2), (3)—where the value of goods other than those produced in the Contracting State exceeds five per cent or they are insufficiently worked.

<sup>2</sup> Protocol No. 3 Art. 3.

<sup>3</sup> Protocol No. 3 Art. 4.

<sup>4</sup> Protocol No. 3 Arts. 5, 6.

<sup>5</sup> Protocol No. 3 Art. 7.

<sup>6</sup> Protocol No. 3 Arts. 8–17.

<sup>7</sup> Reg. 3469/7, O.J. 1973 L.356/29 (Austria); 3470/73, L.356/36 (Finland); 3471/73, L.356/43 (Iceland); 3472/73, L.356/47 (Norway); 3473/73, L.356/53 (Portugal); 3474/73, L.356/57 (Sweden); 3475/73, L.356/66 (Switzerland); replacing 417/73, O.J. 1973 L.59/1 (Austria); 418/73, L.59/8 (Portugal); 419/73, L.59/12 (Sweden); 420/73, L.59/22 (Switzerland).

<sup>8</sup> O.J. 1973 L.101/1 as amended by Reg. 2995/73, O.J. 1973 L.305/1; Reg. 1693/73, O.J. 1973 L.171/105 (Norway); see above, p. 209 n. 2.

<sup>9</sup> Anon., *Revue du Marché Commun*, 1972, p. 710.

<sup>10</sup> For literature see De Nova, loc. cit. (above, p. 201 n. 2), at p. 352 n. 15.

<sup>11</sup> Malta Art. 2 (1); see also Cyprus Art. 2 (1).



It is to be achieved in two successive stages of five years each.<sup>1</sup> The Association Agreements only cover the first period and provide for negotiations to determine the terms of the second stage.<sup>2</sup>

The two Agreements are identical in so far as they provide for reductions, on the one hand, in the customs tariff of the E.E.C. and, on the other hand, in those of Malta and Cyprus respectively.<sup>3</sup> Internal fiscal measures or practices which directly or indirectly discriminate against products of one of the Contracting Parties are forbidden.<sup>4</sup> Discrimination is generally prohibited in rules of trade between Member States, their nationals or companies.<sup>5</sup> Export duties must not exceed those imposed in the trade with the most-favoured third country.<sup>6</sup> The benefits of the Agreements are restricted to goods originating in those countries as defined by elaborate provisions in the Protocol which are similar to those attached to the Association Agreements of E.F.T.A. countries,<sup>7</sup> except that no allowance is made for the use of goods or materials from another Associated Country.<sup>8</sup> Dumping, the grant of bounties and subsidies, entitles the other Party to take protective measures in accordance with G.A.T.T. Art. VII, after having consulted the Association Council.<sup>9</sup> As in the Association Agreements with E.F.T.A. countries,<sup>10</sup> payments relating to trade and the transfer of payments to the creditor in the other Contracting Party must be allowed,<sup>11</sup> and the outbreak of serious disturbances in the economy of a Contracting Party, any threat to the financial stability and difficulties resulting in the deterioration of the economic situation, justify the imposition of the necessary protective measures, subject to consultation.<sup>12</sup> Similarly the provision of Art. 36 E.E.C. allowing an exception on grounds of public morality, public order or public security etc.<sup>13</sup> is incorporated<sup>14</sup> and an Association Council, of the same kind as the Joint Committee in the Association Agreements with E.F.T.A. countries,<sup>15</sup> is set up.<sup>16</sup>

*Technically* the most important feature is a reduction in customs duties,<sup>17</sup> the almost complete abolition of quantitative restrictions by the E.E.C.<sup>18</sup> and a standstill by Malta and Cyprus.<sup>19</sup> The E.E.C. reduces its customs duties by 70 per cent, subject to certain exceptions (mainly agricultural products<sup>20</sup>), while Malta and Cyprus reduce theirs by 75 per cent over a period of five years;<sup>21</sup>

<sup>1</sup> Malta Art. 2 (2); see also Cyprus Art. 2 (2).

<sup>2</sup> Malta Art. 2 (3), (4), prolonged Reg. 666/76, O.J. 1976 L.81/1; see also Cyprus Art. 2 (3), (4).

<sup>3</sup> Malta Art. 3 (1), (2); see also Cyprus Art. 3 (1), (2).

<sup>4</sup> Malta Art. 4; see also Cyprus Art. 4.

<sup>5</sup> Malta Art. 5; see also Cyprus Art. 5.

<sup>6</sup> Malta Art. 6; see also Cyprus Art. 6.

<sup>7</sup> Malta Art. 7 and Protocol; Reg. 1328/74, O.J. 1974 L.145/19; Cyprus Art. 7 and Protocol.

<sup>8</sup> Austria, Switzerland, Sweden, Finland, Portugal, Iceland, Norway, Protocol 3 Arts. 2, 5 and Lists A and B.

<sup>9</sup> Malta Art. 8; see also Cyprus Art. 8.

<sup>10</sup> Above, p. 204 n. 4 with references; p. 206 n. 2 with references.

<sup>11</sup> Malta Art. 9; see also Cyprus Art. 9.

<sup>12</sup> Malta Art. 10; see also Cyprus Art. 10.

<sup>13</sup> Above, p. 205 n. 6.

<sup>14</sup> Malta Art. 11; see also Cyprus Art. 11.

<sup>15</sup> Above, p. 206 n. 5.

<sup>16</sup> Malta Arts. 12-14; see also Cyprus Arts. 12-14.

<sup>17</sup> Malta Art. 3 and Annex I; Cyprus Art. 3 and Annex I.

<sup>18</sup> Malta Annex I Art. 5; Cyprus Annex I Art. 9.

<sup>19</sup> Malta Annex II Art. 6; Cyprus Annex II Art. 6.

<sup>20</sup> Malta Annex I Art. 1; Cyprus Annex I Art. 1.

<sup>21</sup> Malta Annex II Art. 1; Cyprus Annex II Art. 1.

the E.E.C. applies the reduction also to goods subject to annual tariff quotas<sup>1</sup> and exempts them from charges equivalent to customs duties,<sup>2</sup> while Malta and Cyprus must treat Community goods not less favourably than goods enjoying most-favoured-nation treatment.<sup>3</sup> The E.E.C. retains its right to impose a variable levy in accordance with Reg. 1059/69 on processed agricultural products,<sup>4</sup> reduced, however, by 70 per cent,<sup>5</sup> while for other goods (mainly oranges and other citrus fruit) the tariff is reduced by 40 per cent or they are zero-rated in favour of Cyprus, but not of Malta.<sup>6</sup>

(b) *Greece and Turkey*. The Association Agreement of 9 July 1961 between the E.E.C. and Greece (Athens Agreement)<sup>7</sup> is both more extensive and more restrictive than those with Malta and Cyprus. The preamble expresses the desire to promote commercial exchanges between the Parties with a view to the creation of a Customs Union (i.e. full membership), and common action by harmonizing economic policies *while ensuring an accelerated growth of the Greek economy*. Discrimination between nationals of the Contracting Parties, including companies in the meaning of E.E.C. Art. 58, is forbidden.<sup>8</sup> Freedom of trade is the main purpose, and to this end, customs duties, export duties and charges having equivalent effect are to be abolished, and the adoption of the Community tariff system is envisaged at the end of twelve years.<sup>9</sup> The benefit of the relaxation of duties affects goods and products of these countries, including elements taken from goods, products of third parties, *en libre pratique*, including such products themselves.<sup>10</sup> A somewhat complicated provision makes it possible to treat on the same footing products which include in their manufacture products from third countries not *en libre pratique*.<sup>11</sup> If, in the opinion of a Contracting Party, a deflection of trade takes place or economic difficulties arise because customs duties, quantitative restrictions, etc., differ from each other in the countries of the Parties, the Association Council must be consulted,<sup>12</sup> but the necessary protective measures may be taken immediately, subject to the Association Council's right to modify or abrogate them.<sup>13</sup>

Technically, the freedom of trade is achieved by a standstill of import and export duties including customs duties of a fiscal nature<sup>14</sup> and of charges of an equivalent effect.<sup>15</sup> They must be abrogated progressively according to a scheme which envisages generally reductions of 10 per cent, in eight successive stages,

<sup>1</sup> Malta Annex I Art. 2; Cyprus Annex I Art. 2.

<sup>2</sup> Cyprus Annex I Art. 3.

<sup>3</sup> Malta Annex II Art. 2; Cyprus Annex II Art. 2.

<sup>4</sup> O.J. 1969 L.14, last amended by Reg. 1491/73, O.J. 1973 L.151/1.

<sup>5</sup> Malta Annex I Art. 3; Cyprus Annex I Art. 4.

<sup>6</sup> Cyprus Annex I Arts. 5-7.

<sup>7</sup> For literature see De Nova, loc. cit. (above, p. 201 n. 2), at p. 350 n. 5, to which should be added Masson, *Droit Européen*, 4 (1961), p. 381; Alexander, *Revue hellénique de droit international*, 15 (1962), p. 10; Varouxakis, *Revue du Marché Commun*, 1964, p. 537; Mansholt, *ibid.*, 1966, p. 314; Calogeropoulos, *ibid.*, 1967, p. 92; Bianconi, *Rivista di diritto europeo*, 11 (1971), p. 39.

<sup>8</sup> Greece Art. 5.

<sup>9</sup> Greece Art. 6.

<sup>10</sup> Greece Art. 7; but see, as to special emergency measures regarding such goods, Art. 10 (4).

<sup>11</sup> Greece Art. 8; Reg. 610/72, O.J. 1972 L.75/7; amended by Reg. 1411/74, O.J. 1974 L.150/6; Reg. 2911/74, O.J. 1974 L.313/52; replaced by Reg. 3242/75, O.J. 1975 L.322/1.

<sup>12</sup> Greece Art. 10 (1).

<sup>13</sup> Greece Art. 10 (2).

<sup>14</sup> Greece Art. 17; coupled with the right to replace them by an internal tax (cp. E.E.C. Art. 95); for the possibility of modifications see Art. 17 (4).

<sup>15</sup> Greece Art. 12.

within a period of twelve years, and for particularly vulnerable products of Greece by 5 per cent over a period of twenty-two years.<sup>1</sup> Acceleration is also allowed.<sup>2</sup> In accordance with the general purpose of the Agreement, which is to safeguard the industrial development of the Associated Country, Greece retains the right to re-establish or to increase customs duties in order to assist new industries, but this right is hedged around with restrictions.<sup>3</sup> Meanwhile the Greek Customs Tariff is to be aligned with the Community Tariff which is to take its place.<sup>4</sup>

Quantitative restrictions are prohibited in principle, subject to a standstill and to exceptions and to the right to reintroduce such restrictions;<sup>5</sup> they must be abrogated in accordance with a time table ending in the twenty-second year.<sup>6</sup> Quantitative restrictions on exports are also abolished, subject to the right to reintroduce them.<sup>7</sup> All abrogating measures may be accelerated.<sup>8</sup> The usual clause (E.E.C. Art. 36) for the protection of public morals, public order and public security etc., is included, together with another (reproducing E.E.C. Art. 37) urging the gradual adjustment of commercial monopolies so as to exclude discrimination in buying and selling among nationals of the Member States.<sup>9</sup> Unlike the agreements with E.F.T.A. countries, which do not envisage eventual membership of the Community, the agreement with Greece includes agriculture,<sup>10</sup> and provides a framework for an eventual adjustment of agricultural policies, but certain agricultural products are included in the general abolition of customs duties etc.,<sup>11</sup> and are subject to a possible regime of minimum prices (cp. E.E.C. Art. 44 (1)).<sup>12</sup>

Freedom of movement for workers (E.E.C. Arts. 48, 49) is to be introduced in accordance with a scheme to be drawn up by the Association Council<sup>13</sup> together with similar schemes facilitating freedom of establishment (E.E.C. Arts. 52-6, 58)<sup>14</sup> and for the provision of services across frontiers (E.E.C. Art. 59).<sup>15</sup> Similarly, the provisions on transport (E.E.C. Arts. 74-84) are to be introduced in due course.<sup>16</sup>

Again, the rules of the E.E.C. Treaty on Competition and aids (E.E.C. Arts. 85, 86, 90, 92) are to be given effect after the Joint Council has formulated the conditions and modalities of their application.<sup>17</sup> For ten years aids by Greece are to be treated as compatible with the Treaty (E.E.C. Art. 92 (3) (a)) on the ground that they are presumed to concern an area where the standard of living is abnormally low or where there is serious underemployment.<sup>18</sup> Following E.E.C. Art. 95 no taxes may be imposed directly or indirectly in excess of those imposed on similar domestic products or export rebates granted in excess of this taxation, the provisions of the E.E.C. Treaty (Art. 95) on turnover taxes are

<sup>1</sup> Greece Arts. 13-15 and Annex I Art. 19.

<sup>2</sup> Greece Art. 16.

<sup>3</sup> Greece Art. 18.

<sup>4</sup> Greece Art. 20.

<sup>5</sup> Greece Arts. 22, 23, 24.

<sup>6</sup> Greece Arts. 25, 26; all measures equivalent to quantitative restrictions must be abolished at the end of twelve years: Art. 27.

<sup>7</sup> Greece Art. 28.

<sup>8</sup> Greece Art. 29.

<sup>9</sup> Greece Art. 31.

<sup>10</sup> Greece Arts. 32-43 and Annex II.

<sup>11</sup> Greece Art. 37 and Annex III Art. 38; see Mansholt, loc. cit. (above, p. 212 n. 7), at p. 317.

<sup>12</sup> Greece Art. 41; Lipstein, *The Law of the E.E.C.* (1974), pp. 68, 81.

<sup>13</sup> Greece Arts. 44-6.

<sup>14</sup> Greece Arts. 47-8.

<sup>15</sup> Greece Art. 49.

<sup>16</sup> Greece Art. 50.

<sup>17</sup> Greece Arts. 51, 52 (1).

<sup>18</sup> Greece Art. 52 (2).



adopted<sup>1</sup> and safeguarding measures by either Party are allowed.<sup>2</sup> Such measures may also be taken to combat *dumping* (E.E.C. Art. 91).<sup>3</sup>

General provisions on economic policy, i.e., balance of payments,<sup>4</sup> exchange rates,<sup>5</sup> international payments and capital transfers,<sup>6</sup> and a general safeguarding clause comparable to E.E.C. Art. 108,<sup>7</sup> are also included.

An Association Council consisting of members representing the Member States of the E.E.C., the E.E.C. Council and the Commission and Greece, exercises supervision and a power of decision in specific cases.<sup>8</sup> Disputes which cannot be settled by the Council go to arbitration in a manner laid down by the Association Agreement.<sup>9</sup> The Association Agreement of 12 September 1963 between the E.E.C. and Turkey (Ankara Agreement)<sup>10</sup> also envisages the creation of a Customs Union, but the progressive integration of Turkey is to occur in three phases.<sup>11</sup> First is a preparatory phase of five years during which the Turkish economy is to be strengthened with the help of the E.E.C.<sup>12</sup> After four years or, if necessary, later, the parties must determine whether and on what terms<sup>13</sup> the second, transitory phase, which is not to exceed twelve years, is to introduce progressively the structure of a customs union and to approximate the respective economic policies.<sup>14</sup> The final phase marks the creation of a customs union. The formation of the latter entails the abrogation of all customs duties, of charges having an equivalent effect and of quantitative restrictions, as well as the adoption of the common customs tariff.<sup>15</sup> It also covers agriculture,<sup>16</sup> and even during the preparatory and transitional phases freedom of movement for workers, of establishment and of services, is to be facilitated gradually.<sup>17</sup> The same applies to the observance of the E.E.C. rules on competition, taxation and the approximation of laws, the balance of payments, the policy concerning economic trends, the rate of exchange, and the transfer of payments for commercial purposes.<sup>18</sup> An Association Council of the same kind as that created by the Greek Association Agreement ensures the proper working of the Agreement;<sup>19</sup> unlike the Association Council for Greece, it can, but need not, refer a dispute to arbitration; if such a reference is made, it is to be submitted to the Community Court or any other existing judicial institution.<sup>20</sup>

During the interim stages Turkey enjoys preferential tariff quotas<sup>21</sup> and the European Bank for Investments can give financial assistance to certain Turkish

<sup>1</sup> Greece Arts. 53, 54.

<sup>2</sup> Greece Art. 55.

<sup>3</sup> Greece Art. 56.

<sup>4</sup> Greece Art. 58.

<sup>5</sup> Greece Art. 59.

<sup>6</sup> Greece Arts. 61, 62, 63.

<sup>7</sup> Greece Art. 60.

<sup>8</sup> Greece Arts. 65-6.

<sup>9</sup> Greece Art. 67; two arbitrators, chosen respectively by the parties, the third during the first five years by the President of the Community Court, thereafter by the two arbitrators, and failing their agreement by the President of the International Court of Justice.

<sup>10</sup> For literature see De Nova, loc. cit. (above p. 201 n. 2) at p. 350 n. 6; Dubois, *Revue du Marché Commun*, 1964, p. 68.

<sup>11</sup> Turkey Art. 2.

<sup>12</sup> Turkey Art. 3 and Protocol (Provisional Protocol) laying down a time-table.

<sup>13</sup> Turkey Arts. 4-9; in particular, discrimination between nationals of the Contracting Parties is to be abolished.

<sup>14</sup> Turkey Art. 5.

<sup>15</sup> Turkey Art. 10.

<sup>16</sup> Turkey Art. 11.

<sup>17</sup> Turkey Arts. 12-14.

<sup>18</sup> Turkey Arts. 15-19.

<sup>19</sup> Turkey Arts. 22-7.

<sup>20</sup> Turkey Art. 25 (2); it would seem that arbitration is not excluded: see Art. 25 (4).

<sup>21</sup> Turkey Protocol No. 2 Art. 2.

projects.<sup>1</sup> An additional Protocol of 23 November 1970<sup>2</sup> laid down the terms to be observed during the transitional phase, fixed at twelve years, to follow the preparatory phase. Until it came into force on 1 January 1973 an Interim Agreement attempted to give immediate effect to parts of the Additional Protocol.<sup>3</sup> Thereby a regime on lines similar to the other Association Agreements was set up. It is now possible to concentrate on the Additional Protocol itself.

The new regime covers local products and those *en libre pratique*,<sup>4</sup> but contains a special provision for those which contain other elements (a special levy is charged).<sup>5</sup> The control of the origin of products follows the pattern set in agreements with other countries.<sup>6</sup> Measures to counter deflection of trade proposed by Contracting States are to be considered by the Association Council, but direct action is permitted in case of urgency.<sup>7</sup> In preparation for the establishment of a Customs Union, a standstill is declared in respect of customs duties on imports and exports and of equivalent charges (including charges of a fiscal character), but new export duties may be permitted for a time.<sup>8</sup> The E.E.C. abolishes all customs duties etc., *vis-à-vis* Turkey,<sup>9</sup> while Turkey undertakes to reduce its duties, in a series of phases, by 10 per cent or 5 per cent respectively each time.<sup>10</sup> However, in order to protect a new branch of industry or in order to ensure its expansion, Turkey may, during the first eight years, modify the terms of reduction of duties for certain products listed in Annex 3:<sup>11</sup> all parties are, however, free to accelerate the rate of reduction.<sup>12</sup> Quantitative restrictions of imports and exports are forbidden in principle, and a standstill is to be introduced immediately, unqualified in the E.E.C., but restricted in extent in Turkey, which retains the right to impose new restrictions on a diminishing scale, provided that the E.E.C. is granted a quota.<sup>13</sup> The gradual adoption of the customs tariff of the E.E.C. is regulated in some detail.<sup>14</sup>

The usual safeguards on grounds of public morality, public order, public safety etc. (E.E.C. Art. 36) are maintained,<sup>15</sup> and national monopolies of a commercial character (E.E.C. Art. 37) are to be adjusted gradually over a period of twenty-two years.<sup>16</sup> In principle agricultural products are included in the

<sup>1</sup> Turkey Protocol No. 2.

<sup>2</sup> Reg. 2760/72, O.J. 1972 L.293/1 Art. 7, Art. 61, subject to ratification and notification. For methods of administrative co-operation see now Reg. 428/73, O.J. 1973 L.59/73; 429/73, O.J. 1973 L.59/85; Renier, *Revue du Marché Commun* (1972), p. 162.

<sup>3</sup> Reg. 1232/71, O.J. 1971 L.130/1; see also the Interim Agreement upon the Accession of the new Member States: Reg. 2682/73, O.J. 1973 L.277/1; Reg. 3573/73, O.J. 1973 L.359/1.

<sup>4</sup> Additional Protocol Art. 2; Interim Agreement Art. 1.

<sup>5</sup> Additional Protocol Art. 3; Interim Agreement Art. 2.

<sup>6</sup> Additional Protocol Art. 4; Interim Agreement Art. 3.

<sup>7</sup> Additional Protocol Art. 5; Interim Agreement Art. 4.

<sup>8</sup> Additional Protocol Arts. 7, 15, 16; Interim Agreement Art. 5.

<sup>9</sup> Additional Protocol Art. 9; Interim Agreement Art. 6.

<sup>10</sup> Additional Protocol Arts. 8, 10, 11 and Annex 3; Interim Agreement Art. 7.

<sup>11</sup> Additional Protocol Art. 12.

<sup>12</sup> Additional Protocol Art. 13; Interim Agreement Art. 8 more restrictively.

<sup>13</sup> Additional Protocol Arts. 21-8; Interim Agreement Arts. 10-14.

<sup>14</sup> Additional Protocol Arts. 17-20.

<sup>15</sup> Additional Protocol Art. 29; Interim Agreement Art. 15.

<sup>16</sup> Additional Protocol Art. 30; Interim Agreement Art. 16 (standstill only).

Agreement, but Turkey is given a period of twenty-two years within which to adapt its agricultural policy to that of the E.E.C.<sup>1</sup> In all their dealings discrimination between the Contracting Parties, their nationals and companies is prohibited.<sup>2</sup> In the case of serious economic difficulties affecting their financial stability or a particular region, safeguarding measures are allowed.<sup>3</sup>

The Additional Protocol envisages also a gradual introduction between the twelfth and the twenty-fifth year of freedom of movement of workers, but immediate complete equality of treatment by members of the E.E.C. of such Turkish workers and safeguards for their social security benefits.<sup>4</sup> A standstill is declared for new restrictions on freedom of establishment and the performance of services across frontiers, while the abolition of restrictions affecting them is only contemplated for the future,<sup>5</sup> as it is for transport by rail, road and waterways and, if the situation should arise later on, also by sea and air.<sup>6</sup> Within six years the conditions and the manner of applying E.E.C. Arts. 85, 86, 90 and 92 are to be elaborated with the proviso that, for the purposes of aid, Turkey is to be treated during the transitional phase as a country having an abnormally low standard of living or as suffering from serious underemployment.<sup>7</sup> E.E.C. Arts. 95–8 concerning the level of taxation of goods imported from another Contracting Party, drawbacks, turnover taxes and drawbacks and countervailing charges in respect of charges other than turnover taxes, excise duties and other forms of indirect taxation are incorporated into the Protocol.<sup>8</sup> Safeguarding measures are foreseen against practices forbidden by E.E.C. Arts. 85, 86, 90 and 92 and against dumping (E.E.C. Art. 91).<sup>9</sup> Liberalization of payments and of movements of capital beyond the extent laid down in the Association Agreement is foreshadowed<sup>10</sup> and the coordination of commercial policies, including those with regard to third countries, is outlined broadly.<sup>11</sup>

## 2. *Simple Association Agreements*

Morocco<sup>12</sup> and Tunisia<sup>13</sup> have concluded Conventions with the E.E.C. which introduce immediately for their benefit the abolition of customs duties, equivalent charges and quantitative restrictions,<sup>14</sup> subject to a series of exceptions<sup>15</sup> and restricted to five years, when a broader agreement is to replace it.<sup>16</sup> In

<sup>1</sup> Additional Protocol Arts. 31–5 and Annex 6; Interim Agreement Arts. 18, 19.

<sup>2</sup> Additional Protocol Art. 58; see also Art. 57; Interim Agreement Art. 20.

<sup>3</sup> Additional Protocol Art. 60; Interim Agreement Art. 23.

<sup>4</sup> Additional Protocol Art. 40.

<sup>5</sup> Additional Protocol Art. 41.

<sup>6</sup> Additional Protocol Art. 42.

<sup>7</sup> Additional Protocol Art. 43.

<sup>8</sup> Additional Protocol Arts. 44, 45.

<sup>9</sup> Additional Protocol Arts. 46, 47.

<sup>10</sup> Additional Protocol Arts. 50–2.

<sup>11</sup> Additional Protocol Arts. 53–6.

<sup>12</sup> For literature see De Nova, loc. cit. (above, p. 201 n. 2), at p. 352 n. 13; Petit-Laurent, *Revue du Marché Commun*, 1971, p. 13 (Special Issue: *Morocco and the E.E.C.*).

<sup>13</sup> For literature see De Nova, loc. cit. (above, p. 201 n. 2), at p. 352 n. 14; Dubois, *Revue du Marché Commun*, 1969, p. 355; Meunens, *Sociaal Economische Wetgeving*, 17 (1969), p. 562 (not available).

<sup>14</sup> Morocco Art. 2 (1) and Annex 1 Arts. 1, 7; Tunisia Art. 2 (1) and Annex 1 Arts. 1, 7.

<sup>15</sup> Morocco Annex 1 Arts. 2–6, 8–10; Annex 2; for the reasons see Dubois, loc. cit. (above, n. 13), p. 362; Tunisia Annex 1 Arts. 2–6, 8–10; Annex 2.

<sup>16</sup> Morocco Art. 14; Tunisia Art. 14; amended Reg. 867/75, 868/75, O.J. 1975 L.84/7/12.



return the E.E.C. is granted concessions<sup>1</sup> inasmuch as certain products are to be admitted at a reduced tariff,<sup>2</sup> others (a small number) are exempt from customs duties<sup>3</sup> or from quantitative restrictions in whole or in part,<sup>4</sup> while still others are freed from the requirement of an import licence.<sup>5</sup> However, Morocco and Tunisia retain the right to reintroduce quantitative restrictions for the last-mentioned products, in particular for purposes of industrialization, subject to certain compensatory concessions.<sup>6</sup> All domestic measures of a fiscal nature which discriminate directly or indirectly against products of the other Party are prohibited.<sup>7</sup> In particular Morocco and Tunisia must not accord less favourable treatment to the products of the E.E.C. than to those of other countries enjoying most-favoured-nation treatment.<sup>8</sup> In so far as the Agreements cover the exchange of goods, the transfer of payments is to be authorized.<sup>9</sup> At the same time Morocco and Tunisia are free to withdraw the concessions granted by the Agreements when, quite generally, their requirements for industrialization and development call for measures of protection, restricted, however, to a list of products and with the proviso that corresponding concessions must be granted for other products.<sup>10</sup> Both the E.E.C. and Morocco and Tunisia may take the necessary and least harmful safeguarding measures if serious disturbances occur in a sector of the economy or endanger financial stability or if the economic situation in a region has changed,<sup>11</sup> and the usual reservations for the protection of public morals, public order and public safety etc. (E.E.C. Art. 36) figure here as well.<sup>12</sup>

The standard provisions concerning proof of the origin of the products in one of the countries of the Contracting Parties are included.<sup>13</sup> An Association Council, established on lines similar to the Joint Committees and Councils set up by the other Agreements watches over the execution of the Convention,<sup>14</sup> but there is no provision dealing with the settlement of disputes.

#### IV. ASSOCIATION AGREEMENTS WITH DEVELOPING COUNTRIES

##### 1. *Yaoundé Convention (No. 1), 20 July 1963*<sup>15</sup>

The initial impetus came with the Agreement between the E.E.C. and eighteen

<sup>1</sup> Morocco Art. 2 (2); Tunisia Art. 2 (2).

<sup>2</sup> Morocco Annex 3 Art. 1 and List 1; Tunisia Annex 3 Art. 1 and List 1.

<sup>3</sup> Morocco Annex 3 Art. 2 and List 2; Tunisia Annex 3 Art. 2.

<sup>4</sup> Morocco Annex 3 Arts. 4, 5, 6, 7; Tunisia Annex 3 Arts. 4, 5, 6.

<sup>5</sup> Morocco Annex 3 Art. 3 and List 3; Tunisia Annex 3 Art. 3 and List 2.

<sup>6</sup> Morocco Annex 3 Arts. 3 (2), 4; Tunisia Annex 3 Arts. 3 (2), 4.

<sup>7</sup> Morocco Art. 3; Tunisia Art. 3.

<sup>8</sup> Morocco Art. 4; Tunisia Art. 4.

<sup>9</sup> Morocco Art. 6 Annex 3; Tunisia Art. 6.

<sup>10</sup> Morocco Art. 7 and Annex 3, List 6; Tunisia Art. 7 and Annex 3, List 5.

<sup>11</sup> Morocco Art. 8; Tunisia Art. 8.

<sup>12</sup> Morocco Art. 9; Tunisia Art. 9.

<sup>13</sup> Morocco Art. 5 and the Protocol annexed to the Convention; Tunisia Art. 5 and the Protocol annexed to the Convention; see above, pp. 209, 211, for Austria, Switzerland, Sweden, Finland, Portugal, Iceland and Norway; Cyprus, Protocol; Malta, Protocol.

<sup>14</sup> Morocco Arts. 10-13; Tunisia Arts. 10-13; for its functions see Arts. 7 (2), 8 (4) of the Agreements.

<sup>15</sup> For literature on this and the Second Yaoundé Convention see De Nova, loc. cit. (above, p. 201 n. 2), at p. 531 nn. 9, 12, to which should be added Luchaire, *Recueil Penant*, 1963, p. 415;

French-speaking African States<sup>1</sup> which relaxed the technical restrictions on imports and exports between the E.E.C. and the States concerned. Products originating from one of the Associated Countries were to be gradually freed from customs duties and charges having an equivalent effect in the E.E.C.,<sup>2</sup> while some were to be exempt from duties and charges altogether.<sup>3</sup> Quantitative restrictions by E.E.C. countries were to be removed in accordance with the E.E.C. Treaty.<sup>4</sup> The Associated States must accord equal treatment to the products of members of the E.E.C.,<sup>5</sup> while for certain products, customs duties and charges having an equivalent effect were to be abolished progressively.<sup>6</sup> Nevertheless the Associated States retained the right to maintain or to establish customs duties and charges having an equivalent effect, if their development and industrialization so required, provided that no discrimination was practised.<sup>7</sup> Export duties too were to be applied without discrimination,<sup>8</sup> and quantitative restrictions were to be abolished within four years, while a standstill was proclaimed in the interval,<sup>9</sup> subject to the right to maintain or to reintroduce them in case of need, if the right to maintain or to reintroduce taxes according to Art. 3 proved insufficient.<sup>10</sup> A provision in terms of E.E.C. Art. 37 bound the Associated States to see to it that State monopolies of a commercial character and bodies through which a Member State in law or in fact, directly or indirectly supervises, determines or appreciably influences imports did not discriminate against members of the E.E.C. and complied with the aims of the Convention.<sup>11</sup> The treatment accorded by Associated States was not to be less favourable than that accorded to products of third States enjoying most-favoured-nation treatment.<sup>12</sup> Naturally a provision was included which was framed in terms identical with E.E.C. Art. 36 empowering Associated States to prohibit or to restrict imports and exports as well as transit of goods on grounds of public morals, public order, public safety etc.<sup>13</sup> Within this framework the Contracting Parties were to consult each other, especially in respect of commercial exchanges with third countries which may affect the relations of the Contracting Parties

Jacquot, *ibid.*, 1964, p. 331; Nicomede, *ibid.*, 1966, p. 317; Anon., *Revue du Marché Commun*, 1967, p. 390; Symposium, *ibid.*, 1969, pp. 211-89; Kovar, *Revue trimestrielle de droit européen*, 1968, p. 534; Krohn, *Revue du Marché Commun*, 1973, p. 300.

<sup>1</sup> O.J. 1964, 1429; Burundi, Cameroun, Central African Republic, Congo (Brazzaville) (now the Democratic Republic of the Congo), Congo (Léopoldville) (now Zaire), Ivory Coast, Dahomey, Gabon, Upper Volta, Madagascar (now Malagasy Republic), Mali, Mauritania, Niger, Ruanda, Senegal, Somali, Chad, Togo; Mauritius acceded on 12 May 1972, O.J. 1973 L.288/1. For the Association of Overseas Countries and Territories see Council Decision 64/349 of 25 February 1964, O.J. 1964, 1472, i.e. Netherlands Antilles, Surinam, French Overseas Territories (Saint Pierre and Miquelon, Comoros), French Somaliland (Afars et Issas), New Hebrides, French Southern and Antarctic Territories, French Overseas Departments (Guyana, Guadeloupe, Martinique, Réunion).

<sup>2</sup> Art. 2 (1); for products falling within the E.C.S.C. Treaty see the Agreement 64/347 E.E.C., O.J. 1964, 1458.

<sup>3</sup> Art. 2 (2) and Annex (pineapple, coconuts, coffee, tea, pepper, vanilla, cloves, nutmeg, cocoa in beans or broken, tropical timber).

<sup>4</sup> Art. 5.  
<sup>5</sup> Art. 3 (1); for products falling within the E.C.S.C. Treaty see the Agreement 64/347 E.E.C., O.J. 1964, 1458.

<sup>8</sup> Art. 4.

<sup>6</sup> Art. 3 (2) (i) and Protocol No. 1.

<sup>9</sup> Art. 6 (1), (2).

<sup>7</sup> Art. 3 (2) (ii).

<sup>10</sup> Art. 6 (3) and Protocol No. 2.

<sup>11</sup> Art. 6 (4).

<sup>12</sup> Art. 7.

<sup>13</sup> Art. 10.

as a result of the abolition of taxes or quotas at a nil or reduced tariff.<sup>1</sup> They could take safeguarding measures in case of serious disturbance in an economic sector or danger to their financial stability.<sup>2</sup> Fiscal measures which directly or indirectly discriminate between domestic products and those of the other Contracting Parties were forbidden.<sup>3</sup>

The E.E.C. engaged itself to assist in the economic and social development of the Associated States by placing at the disposal of the 'European Development Fund'<sup>4</sup> sums of money to be used for the purposes of economic investments, general technical co-operation, aids for diversifying production and the stabilization of prices.<sup>5</sup> The beneficiaries could be, having regard to the various purposes of aids, either the Associated States or non-profit making legal entities controlled by these States or their organs, the governments of the Associated States, specialized institutes or agencies, producers or organizations of producers and, exceptionally, scholarship holders and probationers.<sup>6</sup>

Within three years nationals and companies of E.E.C. countries were to be placed on an equal footing with local nationals in respect of freedom of establishment and services across frontiers, but individual Associated States could be allowed to suspend this right for a certain period and for a certain activity;<sup>7</sup> moreover the benefit of most-favoured-nation treatment was to be accorded.<sup>8</sup> Both Contracting Parties undertook to authorize payments arising out of the exchange of goods, the performance of services, the movement of capital and of salaries as envisaged by the Convention. For this purpose the Associated States agreed to a standstill of restrictions on investments and payments on current account in connection with the movement of capital by nationals of E.E.C. countries.<sup>9</sup>

An Association Council,<sup>10</sup> assisted by an Association Committee,<sup>11</sup> a Parliamentary Conference<sup>12</sup> and an Arbitration Tribunal<sup>13</sup> were to watch over the execution of the Agreement. The Association Agreement covered the European territories of the E.E.C. and the French Overseas Departments.<sup>14</sup>

The very important question as to the proof of the origin of products enjoying the benefit of the Convention was dealt with by Protocol No. 3, which envisaged the elaboration by the Association Council of a definition of 'origin of

<sup>1</sup> Art. 12.

<sup>2</sup> Art. 13.

<sup>3</sup> Art. 14.

<sup>4</sup> Arts. 15, 16, 18, 19, 20; for its functions see Reg. 62/65, O.J. 1965, 1397; amended (Art. 28) Reg. 964/69, O.J. 1969 L.126/7; Reg. 1253/69, O.J. 1969 L.158/45. For its operation see Buchet de Neuilly, *Revue du Marché Commun*, 1970, p. 84. See Council Decisions 75/492 of 22 July 1975, O.J. 1975 L.221/20; 75/493, O.J. 1975 L.221/21.

<sup>5</sup> Arts. 17 with further details, 18 and Protocol No. 5.

<sup>6</sup> Art. 24.

<sup>7</sup> Art. 29; for the meaning of freedom of establishment see Art. 31; of services across frontiers see Art. 32; of companies see Art. 33 (equal to E.E.C. Art. 58).

<sup>8</sup> Art. 30.

<sup>9</sup> Arts. 35-7.

<sup>10</sup> Arts. 39-44; its decisions are binding: Art. 44 (1).

<sup>11</sup> Arts. 45-7.

<sup>12</sup> Art. 50; see Regulations of 8 December 1964, O.J. 1964, 3709; revised 7 December 1965, O.J. 1965, 3241.

<sup>13</sup> Art. 5.

<sup>14</sup> Art. 55; for the exclusion of New Members of the E.E.C. until 31 January 1975 see Act of Accession (Cmd. 4862-I, p. 98), Arts. 109-15; for the position of the independent Commonwealth Countries see Act of Accession, Protocol No. 22 and Annex VI (Cmd. 4862-I, p. 69).



products'. This was provided by Council Decision of 5 May 1966.<sup>1</sup> The benefit of the Association Agreement accrued to those products which fulfilled the requirements taken up later on by the more detailed Association Agreements with E.F.T.A. countries set out above.<sup>2</sup>

*Yaoundé Convention (No. 2)* of 29 July 1969<sup>3</sup> reproduced in an enlarged and more advanced form the previous Convention. The E.E.C. waived all customs duties and charges having an equivalent effect, except for products falling within the ambit of an agricultural organization (E.E.C. Treaty, Annex II).<sup>4</sup> Conversely the Associated States waived their customs duties and charges,<sup>5</sup> except that the latter could maintain or establish them if their needs for development so required.<sup>6</sup> Associated States could impose export duties on a non-discriminatory basis.<sup>7</sup> As in all other Conventions a provision identical with E.E.C. Art. 95 prohibits any internal taxation which directly or indirectly discriminates between domestic products and those of the other Parties.<sup>8</sup>

The E.E.C. was to suppress all quantitative restrictions and measures having an equivalent effect, except for the agricultural products mentioned above,<sup>9</sup> while the Associated Countries were to observe the same principle,<sup>10</sup> subject to the right to maintain or to reintroduce them without discrimination if the requirements of development or difficulties in the balance of payments so demanded.<sup>11</sup> Provisions in terms of E.E.C. Arts. 36 and 37 were included.<sup>12</sup> The notion of 'products originating' in one of the Contracting States was maintained in accordance with the pattern established for the earlier Convention.<sup>13</sup> The benefit of most-favoured-nation Agreements must be accorded.<sup>14</sup> The usual safeguarding measures were allowed.<sup>15</sup> Assistance to promote economic and social development was continued by the same means (The European Development Fund) and for the same tasks<sup>16</sup> to the same beneficiaries.<sup>17</sup>

<sup>1</sup> 66/303, O.J. 1966, 1445, amended by Council Decision 70/553, O.J. 1970, 284/62; 66/304, O.J. 1966, 481; for the difficulties surrounding it see Nicomede, *Recueil Penant*, 1966, p. 317 at p. 320; for Surinam see Council Decision, 14 December 1970, 70/551, O.J. 1970 L.284/57.

<sup>2</sup> Above, pp. 209-10.

<sup>3</sup> O.J. 1970 L.282/2; for its operation in the E.E.C. see the Internal Agreement 70/543 of 29 July 1969, O.J. 1970 L.282/14; 70/544, O.J. 1970 L.282/17.

<sup>4</sup> Art. 2 and Protocol 1; cp. Yaoundé (No. 1) Art. 2.

<sup>5</sup> Art. 3 (1); cp. Yaoundé (No. 1) Art. 3 (1).

<sup>6</sup> Art. 3 (2) and Protocol No. 2; cp. Yaoundé (No. 1) Art. 3 (2).

<sup>7</sup> Art. 4 (1); cp. Yaoundé (No. 1) Art. 4 (1).

<sup>8</sup> Art. 5; cp. Yaoundé (No. 1) Art. 3 (2) last para.

<sup>9</sup> Art. 6 in conjunction with Art. 2 (2); cp. Yaoundé (No. 1) Art. 5 (1).

<sup>10</sup> Art. 7 (1); cp. Yaoundé (No. 1) Art. 6 (1).

<sup>11</sup> Art. 7 (2) and Protocol No. 3; cp. Yaoundé (No. 1) Art. 6 (3).

<sup>12</sup> Art. 7 (4); cp. Yaoundé (No. 1) Art. 6 (4); Art. 9; cp. Yaoundé (No. 1) Art. 10; see above, p. 218.

<sup>13</sup> Art. 10 (1); see Council Decision 66/303, O.J. 1966, 1445—above, n. 1, but see Annex I; Decision A.A.S.M. Association Council 27 December 1974, O.J. 1975 L.84/4.

<sup>14</sup> Art. 11; cp. Yaoundé (No. 1) Arts. 7, 30; above, p. 219 and n. 8.

<sup>15</sup> Arts. 9, 16; cp. Yaoundé (No. 1) Arts. 10, 13; above, pp. 218-19.

<sup>16</sup> Arts. 17, 18, 19, 20, 21 and Protocol No. 6; cp. Yaoundé (No. 1) Arts. 15, 16, 17, 18, 19, 20 with some slight modifications; e.g. Art. 20 (reserve fund).

<sup>17</sup> Art. 25; cp. Yaoundé (No. 1) Art. 24; see the Internal Agreement of 29 July 1969, 70/544, O.J. 1970 L.282/47 concerning the financing and the administration of aid.

Freedom of establishment and of services across frontiers was assured for the first time on the basis of non-discrimination for the benefit of nationals and companies of E.E.C. countries<sup>1</sup> and with the benefit of most-favoured-nation treatment.<sup>2</sup> Payments arising out of activities envisaged here were henceforth to be authorized and their transfer to be facilitated.<sup>3</sup>

The organization of the Association by means of a Council, assisted by an Association Committee, a Parliamentary Assembly and an Arbitration Tribunal, was maintained.<sup>4</sup> The range of territories covered remained the same.<sup>5</sup>

## 2. *The Arusha Convention*

Concluded on 24 September 1969,<sup>6</sup> it followed the lines of the Yaoundé Conventions, but was a little less advanced than the second Yaoundé Convention. Again the E.E.C. waived all customs duties and charges having an equivalent effect, except for products falling within the ambit of an agricultural organization.<sup>7</sup> Again, the Associated States waived their customs duties and charges,<sup>8</sup> except that the latter could maintain or establish them if their needs for development so required.<sup>9</sup> Associated States could impose export duties on a non-discriminatory basis,<sup>10</sup> but unlike in the Yaoundé Conventions,<sup>11</sup> internal taxation which directly or indirectly discriminates between domestic products and those of the other Parties was not prohibited expressly.<sup>12</sup> The E.E.C. was to suppress all quantitative restrictions and measures having an equivalent effect, except for the agricultural products mentioned above<sup>13</sup> while the Associated Countries were to observe the same principle,<sup>14</sup> subject to the right to maintain or to reintroduce them without discrimination, if the requirements of development or difficulties in the balance of payments so demand.<sup>15</sup> In contrast to all

<sup>1</sup> Art. 31; cp. Yaoundé (No. 1) Art. 29; for the meaning of freedom of establishment see Art. 33; cp. Yaoundé (No. 1) Art. 31; of services see Art. 34; cp. Yaoundé (No. 1) Art. 32; of companies in the meaning of the Agreement see Art. 35; cp. Yaoundé (No. 1) Art. 33 (equal to E.E.C. Art. 58) and see Annex VI.

<sup>2</sup> Art. 32; cp. Yaoundé (No. 1) Art. 30.

<sup>3</sup> Arts. 37-9; cp. Yaoundé (No. 1) Arts. 35-7; see above, p. 219.

<sup>4</sup> Arts. 41-54; cp. Yaoundé (No. 1) Arts. 39-52; for the organization and functioning of the Arbitration Tribunal see Protocol No. 8; Vignes, *Revue de droit international et de droit comparé*, 1964, pp. 121-4; for the Parliamentary Assembly see O.J. 1975 C.43.

<sup>5</sup> Art. 57; cp. Yaoundé (No. 1) Art. 55; see above, p. 219; for a review of its activities see O.J. 1975 C.43/5. For its duration see Council Decision 75/89 of 30 January 1975, O.J. 1975 L.26/9; 75/68 *ibid.* L.26/8; 75/90 E.C.S.C., *ibid.* L.26/10. For the position of the Overseas Countries and Territories see Council Decision 70/549 of 29 September 1970, O.J. 1970 L.282/83.

<sup>6</sup> O.J. 1970 L.282/56: Tanzania, Uganda, Kenya; for its operation in the E.E.C. see the Internal Agreement 70/548 of 24 September 1969, O.J. 1970 L.282/80 and for the earlier Agreement of 26 July 1968, *International Legal Materials*, 8 (1969), p. 741; and the comments by Wockenforth, *Aussenwirtschaftsdienst des Betriebsberaters*, 1969, p. 324; and see De Nova, *Diritto internazionale*, 25 (1971), I, p. 347 at p. 351 n. 10.

<sup>7</sup> Art. 2; cp. Yaoundé (No. 2) Art. 2; subject to restrictions for raw coffee, cloves and preserves of pineapple.

<sup>8</sup> Art. 3 (1); cp. Yaoundé (No. 2) Art. 3 (1).

<sup>9</sup> Art. 3 (2) and Protocol No. 2; cp. Yaoundé (No. 2) Art. 3 (2); Art. 3 (3) is slightly altered.

<sup>10</sup> Art. 4; cp. Yaoundé (No. 2) Art. 4.

<sup>11</sup> See above, p. 220 n. 8.

<sup>12</sup> Art. 5 of the Yaoundé Convention (No. 2) has no counterpart in the Arusha Agreement.

<sup>13</sup> Art. 5; cp. Yaoundé (No. 2) Art. 6; Art. 5 (3) is slightly modified.

<sup>14</sup> Art. 6 (1); cp. Yaoundé (No. 2) Art. 7 (1).

<sup>15</sup> Art. 6 (2); cp. Yaoundé (No. 2) Art. 7 (2), (3).

other Association Agreements the notion of 'products originating' was not defined and was left to be elaborated later on.<sup>1</sup> Once again, the benefit of most-favoured-nation agreements was to be accorded.<sup>2</sup> Once again a provision in terms of E.E.C. Art. 36 was incorporated reserving the right to act on grounds of public morals, public order and public security etc.,<sup>3</sup> but unlike the other Association Agreements,<sup>4</sup> the Convention had no provision on the lines of E.E.C. Art. 37 requiring the adjustment of commercial State monopolies. The usual safeguarding measures were allowed once again<sup>5</sup> but no mention was made of assistance to promote economic and social development through the good offices of the European Development Fund.<sup>6</sup> Freedom of establishment and services across frontiers were assured here as well on the basis of non-discrimination<sup>7</sup> and most-favoured-nation treatment,<sup>8</sup> but unlike the Yaoundé Agreement, the Convention contained no proviso that no greater rights to carry out a determined activity can be claimed than is enjoyed by nationals and companies of the local State.<sup>9</sup> Payments arising out of the activities envisaged by the Association Agreement were to be authorized and their transfer to be facilitated.<sup>10</sup>

The organization of the Association was simpler than that established in Yaoundé. A Council was set up,<sup>11</sup> which was to be assisted by a Parliamentary Commission,<sup>12</sup> but no Arbitral Tribunal existed to settle disputes. Instead, an *ad hoc* procedure of arbitration was envisaged.<sup>13</sup>

### 3. *The Lomé Convention of 28 February 1975*<sup>14</sup>

This Convention is both the most comprehensive, inasmuch as it embraces, in addition to the original members of the Yaoundé and Arusha Agreements

<sup>1</sup> Protocol No. 4; cp. Yaoundé (No. 2) Art. 10 (1) and p. 220 n. 13 above.

<sup>2</sup> Art. 8; cp. Yaoundé (No. 2) Art. 11.

<sup>3</sup> Art. 12; cp. Yaoundé (No. 2) Art. 9.

<sup>4</sup> See Yaoundé (No. 2) Art. 7 (4).

<sup>5</sup> Art. 14; cp. Yaoundé (No. 2) Art. 16.

<sup>6</sup> Yaoundé (No. 2) Arts. 17-21, 25, above, p. 220 nn. 16, 17.

<sup>7</sup> Art. 16; cp. Yaoundé (No. 2) Art. 31.

<sup>8</sup> Art. 17; cp. Yaoundé (No. 2) Art. 32, but note the additional restrictions in Arusha Art. 17, second para. incorporating the principle of reciprocity; for the meaning of freedom of establishment see Art. 18; cp. Yaoundé (No. 2) Art. 33; of services Art. 19; cp. Yaoundé (No. 2) Art. 34; of companies in the meaning of the agreement see Art. 20; cp. Yaoundé (No. 1) Art. 35.

<sup>9</sup> Arts. 21, 22; cp. Yaoundé (No. 2) Arts. 37, 39. The Arusha Agreement does not include a provision equal to Art. 38 of the Yaoundé Convention (No. 2).

<sup>10</sup> Art. 21.

<sup>11</sup> Arts. 23-8; cp. Yaoundé (No. 2) Arts. 41-51.

<sup>12</sup> Art. 29; cp. Yaoundé (No. 2) Art. 52.

<sup>13</sup> Art. 28 (2). The Association Agreement with Nigeria of 16 July 1966 never came into force. For the text see *International Legal Materials*, 5 (1966), p. 828; *Journal of Common Market Studies*, 5 (1966), p. 200; for comments see Luchaire, *Revue trimestrielle de droit européen*, 1966, p. 593; Tromm, *Common Market Law Review*, 1967, p. 30; Elias, *Journal of World Trade Law*, 2 (1968), p. 189; Testa, *Annuario di diritto internazionale*, 1965, p. 189; *Revue du Marché Commun*, 1966, p. 597 and the literature cited by De Nova, loc. cit. (above, p. 201 n. 2), at p. 352 n. 18, to which should be added Martin, *Revue du Marché Commun*, 1964, p. 242.

<sup>14</sup> For the text see Council Reg. 199/76, O.J. 1976 L.25/1, supplemented by an agreement on products falling within the E.C.S.C.: Council Decision 76/163/E.C.S.C., O.J. 1976 L.25/144 and by internal agreements on implementing measures: Council Decisions 76/164, 76/165, O.J. 1976 L.25/164, 168; for the background see *Bulletin of the E.E.C.*, 1973, nos. 7-8 p. 6, paras. 1001-1302; 1975, no. 1 paras. 1101-1200; 2322-3, pp. 6-10, 64; no. 2 paras. 1105, 2324-6; valid until 1 March 1980; see Art. 91.



(which it supersedes), further African States<sup>1</sup> and independent members of the Commonwealth in Africa, the Caribbean and the Pacific,<sup>2</sup> and the most advanced, inasmuch as it employs new techniques for commercial agreements between economically unequal partners, new methods of price stabilization for primary products and new forms of organization for administering aid.

The purpose of the Agreement is to promote trade between the parties by paying special regard to the difference in the levels of development between the Contracting Parties, by attempting to secure additional benefits for the trade of the Associated States (henceforth called A.C.P. States) by accelerating the rate of growth of their trade and by improving the conditions whereby their products have access to the market of the E.E.C.<sup>3</sup>

The E.E.C. abolishes customs duties and charges having an equivalent effect for *products originating* in A.C.P. States, but on a basis not more favourable than between Member States.<sup>4</sup> So far the new Convention reiterates the provisions of its predecessor,<sup>5</sup> but it goes a long way beyond it inasmuch as products falling within the ambit of an agricultural organization (E.E.C. Treaty Art. 40 and Annex II) or subject in the E.E.C. to specific rules as a result of the operation of the common agricultural policy are also to be admitted free of customs duties, unless any other measure, apart from customs duties, affects their importation and, if not covered by the previous clause, are to be given more favourable treatment than is accorded to third countries enjoying most-favoured-nation treatment.<sup>6</sup> Subject to the same provisions as those concerning agricultural products, the E.E.C. must suppress all quantitative restrictions or measures having an equivalent effect.<sup>7</sup> The notion of 'originating products' follows largely the pattern established in other Conventions, especially with E.F.T.A. countries,<sup>8</sup> in so far as it attributes local origin to products which incorporate products originating in other A.C.P. countries.<sup>9</sup>

The usual safeguards are preserved in favour of the E.E.C., such as the right to prohibit or to restrict imports on grounds of public morality, public policy

<sup>1</sup> Ethiopia, Guinea, Guinea-Bissau, Equatorial Guinea, Liberia, Somali Democratic Republic, Sudan.

<sup>2</sup> Covered by the Act of Accession, Art. 109 and Protocol No. 22, i.e. Botswana, The Gambia, Ghana, Kenya, Lesotho, Malawi, Nigeria, Sierra Leone, Swaziland, Tanzania, Uganda, Zambia, Bahamas, Barbados, Grenada, Guyana, Jamaica, Trinidad and Tobago, Fiji, Western Samoa, Tonga.

<sup>3</sup> Art. 1 including the French Overseas Departments, so far as title I (Trade Co-operation) is concerned: see Art. 85.

<sup>4</sup> Art. 2 (1); for this purpose the remaining tariffs existing in the New Member States by virtue of the Act of Accession, Arts. 32-6 are to be disregarded.

<sup>5</sup> Yaoundé (No. 2) Art. 2 (1) 1; see above, p. 220 n. 4.

<sup>6</sup> Art. 2 (a) (1) (ii); cp. Yaoundé (No. 2) Art. 2 (2); subject to the right of the E.E.C., after consultation, to include other agricultural products in its common organization or to subject them to specific rules, or if it modifies the common organization or rules; see Art. 2 (b).

<sup>7</sup> Art. 3 (1), (2); Yaoundé (No. 2) Art. 6 in conjunction with Art. 2 (2); see above, p. 220 n. 10.

<sup>8</sup> See above, pp. 209-10.

<sup>9</sup> Art. 9 and Protocol No. 1 Title 1; cp. Yaoundé (No. 2) Art. 10 (1) and Council Dec. 66/503, O.J. 1966, 1445—above, p. 220 n. 13; for certification of origin see Art. 17 (5); Reg. 3229/75, O.J. 1975 L.321/1.

or public security etc. (E.E.C. Treaty Art. 26)<sup>1</sup> and the power to take measures, if serious disturbances occur in a sector of the economy of the Community or in one or more of its Member States which jeopardize their external financial stability, or if difficulties arise which may result in a deterioration in a sector of the economy of a region of the Community.<sup>2</sup> Provision is made for consultation in a series of contingencies, i.e. if measures concerning the approximation of laws and regulations in order to facilitate the movement of goods or existing rules or regulations, their interpretation, application or administration, affect the interests of the A.C.P. States.<sup>3</sup> Unlike the earlier Agreements, the Lomé Convention does not insist on a grant of reciprocity, at least in principle, by the Associated States.<sup>4</sup> The latter must only not discriminate against goods from Member States of the E.E.C. and must concede most-favoured-nation treatment,<sup>5</sup> but special concessions existing between one or more or all A.C.P. States are to be disregarded for this purpose.<sup>6</sup>

The second novel feature is the attempt to stabilize the income of the Associated Countries from export earnings<sup>7</sup> in trade with the E.E.C.<sup>8</sup> For a series of products set out by categories,<sup>9</sup> the level of earnings from the particular product taken as a percentage of total earnings from the export of merchandise is set (*dependence threshold*).<sup>10</sup> For each of the products a so-called *reference level* is established for each A.C.P. State and for each product. This is the average for the last four years, prior to an application for assistance, of receipts from exports to the Community of the product concerned.<sup>11</sup> If in a calendar year these earnings for any one product fall at least 7.5 per cent below the reference level (or, in the case of the least developed land-locked or island States, 2.5 per cent), that country, on application, is entitled to a financial transfer<sup>12</sup> from a stabilization fund administered by the Commission,<sup>13</sup> subject to certain exceptions.<sup>14</sup> In terms of the Agricultural Policy of the E.E.C. the two criteria of the dependence threshold and the reference level may be compared to the target price and the intervention price. The difference in practice is this: under the Lomé Convention the stabilizing payment, called a *financial transfer*, while made without strings to the Associated State,<sup>15</sup> is not a payment outright. While no interest is due,<sup>16</sup> the recipient State must 'contribute' over a period of five

<sup>1</sup> Art. 4; cp. Yaoundé (No. 2) Art. 9, above, p. 220 n. 15.

<sup>2</sup> Art. 10; cp. Yaoundé (No. 2) Art. 16; above, p. 220 n. 6. See now Reg. 157/76, O.J. 1976 L.18/1.

<sup>3</sup> Art. 6.

<sup>4</sup> Art. 7; cp. Yaoundé (No. 2) Art. 3 (1) (2); see above, p. 220 nn. 5, 6.

<sup>5</sup> Art. 7 (1); 2 (a).

<sup>6</sup> Art. 7 (2) (b).

<sup>7</sup> Arts. 16-25.

<sup>8</sup> Subject to exceptions in special cases: Art. 17 (4) where the destination is irrelevant.

<sup>9</sup> Art. 17 (1): Groundnuts, cocoa, coffee, cotton, coconut, palm, palm nuts and kernels, raw hides, skins and leather, wood, fresh bananas, tea, raw sisal, iron ore; others may be added: *ibid.* (3). See Reg. 1598/75, L.166/1. Extended to overseas countries and territories by Reg. 158/76, O.J. 1976 L.18/3.

<sup>10</sup> Art. 17/2: generally 7.5 per cent; for sisal: 5 per cent; for the least developed land-locked or island States 2.5 per cent (i.e., all, except Cameroun, Congo, Ivory Coast, Gabon, Ghana, Guyana, Kenya, Liberia, Nigeria, Senegal, Sierra Leone, Zaire). They are to be reassessed each year; overseas countries and territories may also benefit: Treaty of Accession, Art. 118.

<sup>11</sup> Art. 19 (1).

<sup>12</sup> Art. 19 (2).

<sup>13</sup> Art. 18; this article sets out the financial basis and the method of administering the fund.

<sup>14</sup> Art. 19 (4).

<sup>15</sup> Art. 20.

<sup>16</sup> Art. 21 (1).

years to 'reconstitute' the fund, in certain defined circumstances,<sup>1</sup> or may be relieved of this duty if the unit value of exports does not exceed the reference unit value and the quantity exported to the E.E.C. is not equal to the reference quantity.<sup>2</sup>

Naturally this system of stabilization requires a detailed machinery of statistics, certification and customs co-operation.<sup>3</sup>

A special regime applies, for an indefinite period, at guaranteed prices for specific quantities of cane sugar originating in Association Countries producing and exporting sugar and the supply of which is undertaken by the latter States,<sup>4</sup> to the exclusion of the usual safeguarding clause.<sup>5</sup> This engagement is binding upon the E.E.C. for an indefinite period and the Protocol as a whole is not to be changed for five years,<sup>6</sup> subject to readjustments in certain circumstances.<sup>7</sup> The marketing, the formation of prices and the intervention mechanism are regulated.<sup>8</sup>

The third novel feature is the detailed regulation of industrial co-operation.<sup>9</sup> It provides a framework only, and is not self-executing. It includes projects concerning infrastructures, training, technology and research, information, promotion and trade co-operation. All the schemes are to be promoted on the initiative or with the consent of the Associated States,<sup>10</sup> while the E.E.C. is to contribute in setting up the infrastructures and industries, in the organization and financing of training in industries in the E.E.C. and the Associated States, in keeping the latter informed technologically, in facilitating contacts with firms and institutions possessing technical know-how and in encouraging research facilities for adapting technology to the needs of those States.<sup>11</sup> Since patents and other industrial property rights may impede the use of certain techniques of production, financial and other aid is to be given in order to enable the Associated States to acquire such rights or to obtain licences.<sup>12</sup> Special aid is to be given for the establishment and development of small and medium-sized firms<sup>13</sup> and trade promotion schemes for industrial products of the Associated States are to be carried out.<sup>14</sup> Two bodies, a Committee on Industrial Co-operation and a Centre for Industrial Development, are to supervise the execution of these activities.

The fourth novel feature is the expansion and re-shaping of the European Development Fund<sup>15</sup> which is to help in correcting structural imbalance in the various sectors of the economies of the Associated States. The amount of aid available is fixed, and it is to be employed in fixed proportions for grants *à fonds*

<sup>1</sup> Art. 21 (2).

<sup>2</sup> Art. 21 (4)—the least developed countries are exempted altogether from the duty to contribute: Arts. 21 (5), 48.

<sup>3</sup> Arts. 17 (1) end, (5), 23.

<sup>4</sup> Art. 25 and Protocol No. 3, Arts. 1, 3, and Annex.

<sup>5</sup> Protocol No. 3, Art. 1 (2); cp. Convention Art. 10, above, p. 224 n. 2.

<sup>6</sup> Protocol No. 3, Art. 2.

<sup>7</sup> Protocol No. 3, Art. 7.

<sup>8</sup> Protocol No. 3, Arts. 5, 6.

<sup>9</sup> Arts. 26–39; the objectives are defined in Art. 26.

<sup>10</sup> Arts. 27, 38.

<sup>11</sup> Arts. 28–31 (a) (b) and (d), 33.

<sup>12</sup> Art. 31 (c).

<sup>13</sup> Art. 32.

<sup>14</sup> Art. 34.

<sup>15</sup> Arts. 40–41 and Protocol No. 2; cp. Yaoundé (No. 2) Arts. 17–21 and Protocol No. 6; see above, p. 220 n. 16.



*perdus*, special loans and subscriptions to risk capital, apart from the fund to stabilize the price of primary products.<sup>1</sup> The aid is to be selected and administered jointly by the Contracting Parties<sup>2</sup> and the grants and loans may be made to the States concerned or through the latter to specified bodies<sup>3</sup> for the purposes set out by way of example.<sup>4</sup> The execution of the projects remains in the hands of the Associated States or of the authorized beneficiaries.<sup>5</sup> Exceptional types of aid are envisaged, which are to be fed from a special fund.<sup>6</sup>

As in the second Yaoundé Convention, freedom of establishment is assured on the basis of non-discrimination,<sup>7</sup> for the benefit of nationals and companies or firms of Member States,<sup>8</sup> but in contrast to the Yaoundé Convention (No. 2), the Associated States are free to discriminate, if non-discriminatory treatment cannot be provided. Again, as in the preceding Convention, capital movements linked to investments and to current payments are not to be impeded by exchange restrictions, but restrictions, more or less on the same lines as previously, though in some respects more detailed, are permitted in case of serious economic difficulties or severe balance of payments problems.<sup>9</sup>

The institutions of the Association Agreement are much the same as before, albeit that they carry different names: the Council of Ministers takes the place of the Association Council,<sup>10</sup> assisted by the Committee of Ambassadors, formerly the Association Committee,<sup>11</sup> and the Consultative Assembly fulfils the functions exercised previously by the Parliamentary Assembly.<sup>12</sup> The only difference is that while formerly, if the Association Council could not resolve a dispute, the latter was to be submitted to a standing Arbitration Tribunal, now a failure of the Council of Ministers to clear up a dispute leads to the appointment of an *ad hoc* tribunal.<sup>13</sup>

<sup>1</sup> Art. 42.

<sup>2</sup> Arts. 43, 50, 53, 54.

<sup>3</sup> Arts. 45, 49.

<sup>4</sup> Art. 46.

<sup>5</sup> Arts. 55, 58.

<sup>6</sup> Arts. 58 (2), 59.

<sup>7</sup> Art. 62; Yaoundé (No. 2) Art. 31, above, p. 221 n. 2.

<sup>8</sup> Art. 63 (equal to E.E.C. Art. 58); cp. Yaoundé (No. 2) Art. 35, above, p. 221 n. 1.

<sup>9</sup> Arts. 65, 66; cp. Yaoundé (No. 2) Art. 16; above, p. 220 n. 15.

<sup>10</sup> Arts. 69-75; cp. Yaoundé (No. 2) Arts. 42-6.

<sup>11</sup> Arts. 76-9; cp. Yaoundé (No. 2) Arts. 50-1.

<sup>12</sup> Art. 80; cp. Yaoundé (No. 2) Art. 52. <sup>13</sup> Art. 81; cp. Yaoundé (No. 2) Art. 53.

# JURISDICTION *RATIONE PERSONAE* UNDER THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES\*

By C. F. AMERASINGHE<sup>1</sup>

## A. INTRODUCTION

THE Convention on the Settlement of Investment Disputes between States and Nationals of other States<sup>2</sup> (hereinafter referred to as the Convention) which came into force on 14 October 1966, provides for the settlement of disputes by two types of proceedings, namely conciliation and arbitration. It was designed to strengthen the partnership between countries in the cause of economic development by facilitating the settlement of disputes between States and foreign investors, and thus promoting an atmosphere of mutual confidence and stimulating a larger flow of private international capital into the countries which wish to attract it.<sup>3</sup> The Convention was based on the understanding that the parties to investment disputes frequently do consider it in their mutual interest to settle their disputes by resort to international methods of settlement.<sup>4</sup>

Conciliation and arbitration proceedings are, under the Convention, administered by the International Centre for Settlement of Investment Disputes which has its seat at the headquarters of the International Bank for Reconstruction and Development (World Bank) in Washington. The Centre is essentially an administrative secretariat which is subordinate to an Administrative Council to which each State party to the Convention appoints a representative. The principal officer of the Centre, who is also its registrar, is the Secretary-General. The Centre does not itself conciliate or arbitrate. The conciliation and arbitration proceedings are conducted by conciliators and arbitrators appointed in accordance with the provisions of the Convention which leave much to the choice of the parties but at the same time ensure that, if the parties fail to

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<sup>2</sup> *United Nations Treaty Series*, vol. 575, p. 159; *United States Treaty Series*, vol. 17, p. 1270; *Treaties and Other International Acts Series*, p. 6090; Centre document ICSID/2; *International Legal Materials*, 4 (1965), p. 524; *American Journal of International Law*, 60 (1966), p. 892.

<sup>3</sup> *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States* (hereinafter referred to as *Report of the Executive Directors*), p. 4; annexed to Centre document ICSID/2.

<sup>4</sup> *Report of the Executive Directors*, p. 4.

agree, the conciliation commission or arbitral tribunal will, nevertheless, be constituted and can proceed to a decision.

A question of some importance is in what circumstances and under what conditions conciliation and arbitration proceedings may be conducted under the auspices of the Centre. In outline it may be said that there are four requirements which must be satisfied if the Centre is to have jurisdiction. These requirements are reflected in Article 25, which reads as follows:

- (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
- (2) 'National of another Contracting State' means:
  - (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
  - (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.
- (3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.
- (4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Thus, both parties must have consented to have recourse to the Centre. There are two requirements concerning jurisdiction *ratione materiae*: the dispute must be a legal dispute and it must arise directly out of an investment. Further, there is the requirement that one party must be a State (or one of its constituent subdivisions or agencies), while the other party must be a foreign national. This concerns jurisdiction *ratione personae*; and the purpose of the writer is to examine the jurisdictional requirements of the Convention *ratione personae*.

Article 25 makes it clear that the services of the Centre are not available in connection with disputes between private individuals, between States (including subdivisions or agencies) or between a State and its own nationals. There is



good reason for the disputes which come within the jurisdiction of the Centre to be restricted *ratione personae* in the way they are under Article 25 (1). Disputes between private individuals can be settled through municipal systems of law. Disputes between States and their own nationals fall outside the scope of an international convention intended to deal with foreign investment. Disputes between States may be settled under traditional international law.

Some remarks are warranted at the outset on the principles of interpretation applicable to the Convention's jurisdictional clauses. The interpretation of treaties, particularly multilateral treaties such as the Convention, presents no easy task. Indeed, interpretation of such treaties may be regarded as something other than a strict science. The Vienna Convention on the Law of Treaties provides a set of principles (in Articles 31 to 33) but these are, perhaps inevitably, very general in character.

It is arguable that there are several choices open in the task of interpreting a convention. Certainly the most frequent approach, as reflected in Article 31 of the Vienna Convention, requires that the terms of a treaty be given their ordinary meaning in context and in the light of the object and purpose of the treaty. This means that 'object and purpose' become relevant to interpretation at an early stage and particularly so where it is apparent that the terms of a treaty may have more than one meaning—or have no clear meaning—in context. Also, while it is an acknowledged principle that an international tribunal is a *juge d'exception* and that accordingly its jurisdiction must be clearly established,<sup>1</sup> it has been pointed out that, particularly in relation to the interpretation of jurisdictional agreements or jurisdictional clauses of treaties, international case law supports the view that it is appropriate to apply a teleological and liberal approach so as to sustain the existence of jurisdiction—*ut magis valeat quam pereat*—rather than a more restrictive approach so as to destroy jurisdiction.<sup>2</sup> It is submitted, therefore, that, wherever meaning is not clear and free from ambiguity, a teleological approach is to be advocated in the interpretation of the clauses of the Convention dealing with jurisdiction *ratione personae*. This does not mean that jurisdiction should be upheld at any cost. It does mean that, while where jurisdiction is clearly excluded that fact should be recognized, in other cases a restrictive interpretation which would result in the ouster of jurisdiction should not be adopted where a reasonable teleological approach could bring about the opposite result. This means that the basic tenet of the Convention, namely, that consent between the parties is the cornerstone of jurisdiction,<sup>3</sup> would be given special recognition in that where the parties have clearly consented to jurisdiction, efforts would be made to give effect to that consent, without, of course, doing damage to the express words and clear intent

<sup>1</sup> See authorities cited in I. F. Shihata, *The Power of the International Court to determine its own Jurisdiction* (1965), p. 238. It would also seem that though the I.C.J. is a *juge d'exception*, it does not always take a restrictive outlook in the exercise of its jurisdiction: *ibid.*

<sup>2</sup> H. Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', this *Year Book*, 26 (1949), p. 48 at pp. 65 et seq. and 71 et seq., and particularly the *Free Zones* case, *P.C.I.J.*, Series A, No. 22 (1929), at p. 13.

<sup>3</sup> See *Report of the Executive Directors*, p. 8.

of the Convention and without ignoring the fact that the Convention's provisions relating to jurisdiction *ratione personae* do imply certain limitations.

This approach would have, *inter alia*, two important consequences. First, where the parties agree that a requirement of jurisdiction relating to the nature of the parties set down in the jurisdictional clauses of the Convention is satisfied, every effort should be made to regard such agreement as effective, provided such agreement is not precluded either expressly or implicitly by the terms of the Convention. This means that in cases where such agreement has been reached, the requirements of the Convention would be interpreted as defining the outer limits of the Centre's jurisdiction while leaving ample room for legitimate agreement, and as not necessarily laying down strictly defined conditions. Second, where there is no agreement between the parties relating to the nature of the parties, such requirements, where this is possible, will be liberally and broadly interpreted. The above considerations are particularly relevant in interpreting such concepts, among others, as 'designation' of agencies under Article 25 (1) or 'nationality' under Article 25 (2).

## B. THE STATE PARTY

One party to proceedings under the Convention must be a Contracting State or a constituent subdivision or agency of that State designated to the Centre by that State. What is the meaning of these qualifications?

### (a) *Non-Contracting States*

Article 25 (1) requires that one of the parties be not merely a State but a Contracting State. This clearly means that non-Contracting States cannot be parties to disputes before the Centre, and this was the position also in the original draft of the Convention.

The question was presented by the General Counsel of the World Bank to the Executive Directors, as an issue raised by the earliest draft, whether, assuming that only a fairly small number of States adhered to the Convention initially, it would be desirable to permit access to the machinery of the Centre by non-Contracting States on an *ad hoc* basis. At that stage it was suggested that this might be desirable, provided the parties made a declaration to the Centre that they would abide by the provisions of the Convention with respect to the specific proceeding in respect of which the services of the Centre were sought.<sup>1</sup> But opinions were expressed among the Executive Directors that it would not be desirable to open the Centre to non-Contracting States.<sup>2</sup> At the consultative meetings of legal experts the matter was not adverted to except by one African expert who felt that the facilities of the Centre should be available to non-Contracting States in order to encourage uniformity in arbitral procedures.<sup>3</sup> The matter was not raised again.

<sup>1</sup> *Convention on the Settlement of Investment Disputes between States and Nationals of Other States; Analysis of Documents Concerning the Origin and the Formulation of the Convention* (1970), vol. 2, p. 82 (hereinafter referred to as *History*).

<sup>2</sup> *Ibid.*, pp. 95, 96.

<sup>3</sup> *History*, vol. 2, p. 255.

When, then, does a State become a 'Contracting State'? The term is not defined in the Convention, but Article 68 provides that the Convention enters into force for each State thirty days after the deposit of its instrument of ratification, acceptance or approval of the Convention. There can be no doubt, therefore, that a State becomes a Contracting State thirty days after it has deposited its instrument of ratification, acceptance or approval. This provision cannot be waived by agreement between the parties to a dispute. Thus it is insufficient if a State, instead of signing, ratifying and depositing its instrument of ratification, merely authorizes the *ad hoc* submission to the Centre of a particular dispute or a class of disputes to which it is a party.

The question arises of the time at which the requirement that the State party must be a Contracting State is to be satisfied. The Convention is not explicit on this point and it was not discussed at the drafting stage. The Convention states that the jurisdiction of the Centre 'shall extend to any legal dispute . . . between a Contracting State . . . and a national of another Contracting State which the parties to the dispute consent in writing to submit to the Centre'.<sup>1</sup> The Convention further requires the Secretary-General to register a request for conciliation or arbitration only if he does not find, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre.<sup>2</sup> The identity of the parties must be recorded in the request.<sup>3</sup> The request must therefore reveal the identity of the State party to the dispute. The Secretary-General will then verify whether the State party is a State in respect of which the Convention is in force. If it is not in force for the State party to the dispute he will refuse to register the request because the dispute is manifestly outside the jurisdiction of the Centre. Thus the crucial moment of time might appear to be not the time at which the request is filed but the time, somewhat later, when the Secretary-General takes the request into consideration. But such a distinction may seem to lack cogency; and in any event, since the Secretary-General is expected to act with due celerity, the difference in time will usually be short. Accordingly, it is advisable that the requirement that the State party be a Contracting State should be satisfied at the time the request is filed. In any event it is clear that a State cannot wait to be a Contracting Party till the tribunal or commission takes up its case, as might have been possible if there were no preliminary screening by the Secretary-General.

If the State in question is a non-Contracting State at the crucial time, then it can at most be involved in proceedings which make only marginal use of the Centre's facilities. A procedure for settling disputes to which it is a party may be based as far as possible on the procedures specified in and pursuant to the Convention instead of attempts being made to adopt a set of procedural rules.<sup>4</sup>

<sup>1</sup> Article 25 (1).

<sup>2</sup> Articles 28 (3) and 36 (3).

<sup>3</sup> Articles 28 (2) and 36 (2).

<sup>4</sup> See Clause XII in the *Model Clauses Recording Consent to the Jurisdiction of the International Centre for Settlement of Investment Disputes*, Centre document ICSID/5 (hereinafter referred to as *Model Clauses*); P. Szasz, 'A Practical Guide to the Convention on the Settlement of Investment Disputes', *Cornell Journal of International Law* (1968), p. 17; C. F. Amerasinghe, 'Submissions to the Jurisdiction of the International Centre for Settlement of Investment Disputes', *Journal of Maritime Law and Commerce*, vol. 5 (1974), p. 211.



But although such a procedure may be used, it differs from the procedure under the Convention in three ways. First, no official of the Centre is required to accept the function of appointing arbitrators or conciliators as an authority of last resort in connection with such a proceeding. Hence, it would be necessary to obtain an assurance, before the consent clause was concluded, that the function would be assumed. Secondly, the administrative facilities of the Centre cannot be used to assist in the settlement of the dispute. Thirdly, the arbitral awards of an *ad hoc* tribunal are neither binding nor enforceable under the provisions of the Convention.<sup>1</sup>

Since the crucial date is not the date on which a consent clause submitting to the Centre's jurisdiction is reduced to writing or embodied in an instrument, but the date on which the Secretary-General takes up for consideration the request for conciliation or arbitration, it is possible for a non-Contracting State to be a party to an agreement to submit a dispute to the Centre's jurisdiction which is contingent and will take effect automatically as soon as the State becomes a Contracting State.<sup>2</sup> A caveat may be entered regarding a 'contingent consent clause'. In order to avoid the objection that the parties did not intend the clause to operate contingently but mistakenly intended the clause to be effective immediately on reduction to writing and that, therefore, the clause is devoid of effect because the State in question was not a Contracting State at that time, it is desirable to provide expressly that the date of consent should be the one on which the Convention was in force for both States concerned or for the State not yet a party, as the case may be.

Rules analogous to those discussed above apply to determining the meaning of 'Contracting State' and the position of the private party in connection with the question whether the private party to proceedings is a national of another Contracting State.

#### (b) *Constituent subdivisions and agencies*

(i) *Definition.* In the earliest draft prepared by the General Counsel of the Bank, there was no mention of the possibility that constituent subdivisions or agencies of States were capable of appearing before the Centre where a Contracting State would otherwise appear. The question was raised at the Board of the Bank whether federated states, provinces and municipalities as opposed to other public entities should not have the right to appear before the Centre,<sup>3</sup> and the response was given that the Convention should have a limited scope and therefore only sovereign States should have access to the Centre.<sup>4</sup> An African representative at the consultative meetings made the point that in many countries investment agreements were entered into with statutory corporations and public companies in which the government was a stockholder and suggested that if such entities were excluded the value of the Convention would be reduced.<sup>5</sup>

<sup>1</sup> Articles 53 and 54 of the Convention deal with the effect of an award under the Convention.

<sup>2</sup> See *Model Clauses*, No. X and C. F. Amerasinghe, loc. cit. (above, p. 231 n. 4), at p. 213.

<sup>3</sup> *History*, vol. 2, pp. 65, 66.

<sup>5</sup> *Ibid.*, vol. 2, p. 258.

<sup>4</sup> *Ibid.*, vol. 2, p. 66.

As a result of this, an amendment giving 'political subdivisions or instrumentalities' the capacity to appear before the Centre was considered.<sup>1</sup> Many arguments were presented for and against the idea behind the amendment at the consultative meetings, by governments, and in the Legal Committee.<sup>2</sup> Eventually it was decided that constituent subdivisions and instrumentalities of States should have capacity to appear before the Centre. The result was that Article 25 (1) of the Convention was formulated as it now stands.

What is the exact purport of these terms in the Convention? The history of the drafting shows that different terms were suggested at different times. It would seem to be safe to say, however, that the term 'constituent subdivisions' covers a fair range of subdivisions. Not only would it cover municipalities and local government bodies in unitary States, but it would cover semi-autonomous dependencies, provinces or federated States in non-unitary States and the local government bodies in such subdivisions. That the latter categories are covered emerges from the fact that in the Legal Committee it was proposed that the term used be qualified by the description 'such as a State, Republic or Province',<sup>3</sup> but it was pointed out that this might exclude municipalities and subdivisions of constituent states or provinces,<sup>4</sup> and thus no qualification appears in the final version.

The term 'agencies' offers greater problems of interpretation. Originally the term used was 'instrumentalities'. The point was made that this latter term might include government-owned companies which were separate legal entities and should be avoided.<sup>5</sup> To this the reply was given that the intention was to include only governmental agencies which were legally part of and indistinguishable from the central government. It was recognized that such agencies could sometimes have separate legal personalities and be entrusted with governmental functions, in a manner which differentiated them from government-owned companies.<sup>6</sup> When the term 'agencies' was later substituted, it was not certain whether it was intended to cover a broader range of entities than the term previously used. For example, it was pointed out that in certain multilateral instruments dealing with external debts the term 'agencies' had been used, and had been interpreted very broadly.<sup>7</sup> A more restrictive point was made to the effect that what was probably intended was that only an agency which was acting on behalf of the State would be covered.<sup>8</sup> It was also asked whether agencies of political subdivisions should be included.<sup>9</sup>

It would appear that defining the precise ambit of the term might give rise to difficulties,<sup>10</sup> but that the term was intended to cover as wide a range of entities as possible. It is probably necessary that the entity be acting on behalf of the government of the State concerned or one of its constituent subdivisions, and this is perhaps the main criterion. It would not seem to matter that the

<sup>1</sup> Ibid., vol. 2, p. 288.

<sup>2</sup> Ibid., vol. 2, p. 410 (Germany), 446 (Italy), 500 (Kuwait), 502 (Pakistan), 507 (India), 551 (Australia), 657 (Malagasy), 702 (United Kingdom).

<sup>3</sup> Ibid., vol. 2, p. 856.

<sup>5</sup> Ibid., vol. 2, p. 507.

<sup>8</sup> Ibid., vol. 2, p. 857.

<sup>6</sup> Ibid.

<sup>9</sup> Ibid., vol. 2, p. 860.

<sup>4</sup> Ibid., vol. 2, p. 857.

<sup>7</sup> Ibid., vol. 2, p. 709.

<sup>10</sup> Ibid.

agency belongs to a political subdivision or that it has a separate legal personality from the government. Indeed, the use of the term 'agencies' as opposed to 'instrumentalities' may well indicate that it was intended to include even certain government-owned companies or government-controlled corporations. On the other hand, mere ownership by the government of shares in a public company may be inadequate for the entity to qualify as an agency.

Since, according to Article 25 (1), constituent subdivisions and agencies must be designated to the Centre by the Contracting State in order to have *locus standi* before the Centre, it would seem that the importance of establishing precise definitions for the terms 'constituent subdivisions' and 'agencies' is greatly reduced. If a Contracting State designates a body to the Centre as being an agency or constituent subdivision of that State, a strong presumption is raised that such body is in fact a constituent subdivision or agency, and it is not likely that a tribunal or commission will reject such a designation as being inconsistent with the Convention. On the other hand, it is, of course, the case that the Convention does not leave the ultimate determination of the issue to the Contracting State concerned. In the last resort such determination must be made on an objective basis by the tribunal or commission.

In the case of a constituent subdivision or agency, it must be emphasized that the mere consent agreement between the entity claiming to be a subdivision or agency and the investor should not be regarded as necessarily raising a presumption that such entity satisfies the requirements of the Convention. The question is whether the entity satisfies the jurisdictional requirements of the Convention so as to be able to have *locus standi* in a position which would otherwise be taken by a State. It would make nonsense of the terms of the Convention if that question could be decided even to a limited extent by the entity itself.

At this point an interesting question arises. Can a tribunal or commission *proprio motu* hold that a designated agency or constituent subdivision does not fall into that category, or is it only entitled to investigate the question at the instance of one of the parties? The important provisions of the Convention are Articles 32 (1) and 41 (1) which give tribunals and commissions the power to be judges of their own competence. The jurisprudence of the International Court of Justice and the Permanent Court of International Justice shows that, since these courts were empowered to decide the question of their own competence,<sup>1</sup> they could raise *proprio motu*, and decide, questions relating to their jurisdiction, particularly where such questions did not relate to the consensual acceptance of their jurisdiction.<sup>2</sup> The question whether a designated body falls within the terms of the Convention is, according to the Convention, not a matter for agreement between the actual parties, although a designation by the Contracting State will raise a presumption of fact. It follows, therefore, that a tribunal or commission does have the power to decide the question *proprio motu*.

<sup>1</sup> See Article 36 (6) of the Statute of the International Court of Justice and Article 36 (4) of the Statute of the Permanent Court of International Justice.

<sup>2</sup> See I. F. Shihata, *The Power of the International Court to Determine its own Jurisdiction* (1965), pp. 56 et seq. and cases cited there, particularly *S. S. Wimbledon* case, *P.C.I.J.*, Series A, No. 1 (1923), at p. 20.



(ii) *Designation*. It is a requirement of Article 25 (1) that the constituent subdivision or agency must be 'designated to the Centre', if the Centre is to have jurisdiction over the case. In the early drafts incorporating the idea that such bodies should be given *locus standi* before the Centre, the need for designation to the Centre did not appear. In the Legal Committee, however, it was pointed out that (i) there might be disputes as to whether an entity was a 'political subdivision'<sup>1</sup> and (ii) it was difficult to see how a party that was not a Contracting State could be included in the jurisdiction of the Centre in that way.<sup>2</sup> It was also pointed out that where a State wished to avoid the risk of consent by a political subdivision, the requirement of designation would enable such a State not to designate the political subdivision concerned.<sup>3</sup> Ultimately, the requirement of designation to the Centre in respect of constituent subdivisions and agencies was accepted by the Legal Committee and was incorporated in the Convention.

Although the Convention is not explicit on the point, there is no reason to suppose that a designation could not be limited in some way. Thus, it is conceivable that a designation may be made for a period of time, on certain conditions or for a specific investment. On the other hand, since approval by the Contracting State of the consent of the constituent subdivision or agency is an additional requirement for *locus standi*, a State could withhold approval of consent in any situation rather than limit the designation of a subdivision or agency which it makes. However, the availability of such an option would be useful where a State, pursuant to Article 25 (3), has notified the Centre that approval of the consent by a constituent subdivision or agency is not required.

A relevant question is whether the designation of a subdivision or agency must be officially and formally notified to the Centre by the Contracting State concerned. What the Convention states is that the subdivision or agency must be 'designated to the Centre'. Normally, this would mean that there should be some kind of formal communication of the designation to the Centre. Thus, a mere designation of a subdivision or agency in an investment agreement to which both the Contracting State and the subdivision or agency are parties would *per se* be inadequate. Likewise an undertaking in such an agreement or in an agreement between the Contracting State and an investor to file the designation with the Centre, coupled with a designation in the agreement, clearly does not *per se* fulfil the requirements of the Convention. On the other hand, it is a moot question whether there must always be an official communication of the designation to the Centre. It is arguable that where there was a clear intention on the part of the Contracting State to file the designation with the Centre at the time the designation was made but the formal communication is not made by that State to the Centre, it will suffice if the designation by the State is brought to the attention of the Centre in some way, whether by the State concerned or by one of the parties to the consent agreement, provided this is done before the initial intention is changed. Equally, it is clear that, if an agreement to which the Contracting State is a party and in which it designates a subdivision or agency is

<sup>1</sup> *History*, vol. 2, p. 702.

<sup>2</sup> *Ibid.*, vol. 2, p. 859.

<sup>3</sup> *Ibid.*, vol. 2, p. 859.

communicated by that State to the Centre, this would be an adequate designation to the Centre for the purposes of the Convention.

There is no specific time at which the designation to the Centre should be made. Technically, the 'notification' of the designation to the Centre can be executed even after the dispute has arisen. Clearly, however, it must be made before a request involving the subdivision or agency concerned has been filed with the Centre or at the time such request is filed, for in the absence of a designation to the Centre the Secretary-General will under Article 28 (3) or Article 36 (3) be forced to refuse registration of the request on the ground that there is manifest lack of jurisdiction in the Centre.

(iii) *Approval of consent.* The Convention provides in Article 25 (3) that either the consent by a subdivision or agency of the Contracting State to submit a dispute or disputes to the Centre must be approved by that State or that State must notify the Centre that no such approval is required.

When the question of subdivisions and agencies was first raised, it was pointed out that approval of the consent by the Contracting State would be necessary.<sup>1</sup> However, some representatives and governments then raised objections to this requirement at various stages on the grounds that (i) in federal States certain matters came within the exclusive competence of the constituent States or provinces, and it would be unconstitutional if the federal State's approval were required,<sup>2</sup> (ii) if the subdivision or agency held itself out as competent to promise an investor that a dispute should be submitted to the Centre and the investor acts on such a promise, it ought not subsequently to be possible for the jurisdiction of the Centre to be denied for the reason that the Contracting State had not approved the consent,<sup>3</sup> and (iii) the whole question was an internal problem and should not be reflected in the international sphere.<sup>4</sup> Finally, the suggestion was made that approval of the Contracting State be required except where the Contracting State notified the Centre that no approval was required.<sup>5</sup> This proposal was accepted and Article 25 (3) was adopted in its present form.

What is necessary for a valid approval? A clause in an agreement with the host State in which the host State approves the consent to submit disputes to the Centre given by the subdivision or agency is an adequate form of approval. It is also a valid and effective approval where a designating instrument contains an approval of the consent to arbitration given by the subdivisions or agencies. It is not necessary, for a valid approval under Article 25 (3) of the Convention of a consent given by a subdivision or agency, either that such approval be communicated to the subdivision or agency or that such subdivision or agency accept it as a party to the agreement in which it may be contained or otherwise. Technically, it is not necessary that even the investor be party to the approval or be aware of it. At the same time it is useful in practical terms that such approval be communicated both to the subdivision or agency and to the investor. It would also seem to be clear that where the host State only agrees to approve the consent of the agency or subdivision to submit disputes to the Centre, there is no

<sup>1</sup> *History*, vol. 2, pp. 258, 321.

<sup>3</sup> *Ibid.*, vol. 2, p. 667.

<sup>2</sup> *Ibid.*, vol. 2, pp. 289, 858.

<sup>4</sup> *Ibid.*, vol. 2, p. 860.

<sup>5</sup> *Ibid.*

immediate approval of the consent to settle disputes by reference to the Centre, and the approval must be given at least prior to a request being filed with the Centre.

It may be pointed out that the Convention does not state that the approval, to be valid, must be communicated or come to the attention of the Centre. As a consequence an approval, once given, is valid and cannot be withdrawn on the ground that it had not been communicated to, nor come to the attention of, the Centre. On the other hand, in such a case, when a request for conciliation or arbitration is filed, it will be necessary for the requesting party to give data concerning the approval by the Contracting State of the consent of the subdivision or agency in the request, as required by Rule 2 (1) (c) of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules).<sup>1</sup> If the required information is not provided, the Secretary-General may refuse to register the request on the ground that the request is manifestly ill-founded, because there was no approval. It is clear, however, that, though what is required under the Institution Rule is an indication of the date of the approval of the instrument in which it was recorded, and *prima facie* evidence of the approval or a notification to the Centre, such requirements are not connected with the validity of the approval.

Issues arise concerning the validity of the approval of the consent of a subdivision or agency by a Contracting State. Basically, the validity of such an approval would be determined by the tribunal or commission, as a matter relating to its jurisdiction, as, indeed, would be the question whether an approval had actually been given. Particularly, the question may be asked whether such an approval need be communicated to anyone for it to be valid and at what point of time such an approval becomes valid. It would seem that under the scheme of the Convention such an approval is a unilateral act performed by the Contracting State and does not depend for its validity on communication to anyone. On the other hand, since an overt act would be required for an approval, it would become effective only when it could be clearly said that the Contracting State has given the approval, for example when a Cabinet decision has been taken, or the legislature has resolved to approve, or the Minister concerned (if he has the power) has decided to approve. There should be some externalization of the act of approval, and it would seem inadequate that the official or organ merely intended to approve.

Furthermore, a problem may arise with regard to the withdrawal of approval. It would seem that an approval, once given, is not necessarily irrevocable since the approval, unlike consent to submit to the Centre's jurisdiction, is a unilateral act. The questions which may be asked are whether an approval does ever become irrevocable and, if so, at what point of time. It would seem that the approval would become binding upon the Contracting State and therefore irrevocable when one or both of the parties to the investment agreement have acted or changed their positions in reliance on it. This would necessarily mean that an agreement between the investor and the subdivision or agency to submit

<sup>1</sup> Centre document ICSID/4, Section B, p. 29.



disputes to the Centre's jurisdiction would render the approval irrevocable in respect of that agreement. But it is arguable that even something less than agreement between the parties on submission of disputes to the Centre, such as the incurring of expenditure in reliance on the approval, makes the approval irrevocable. The position would be similar with regard to a notification to the Centre that no approval of the consent of a subdivision or agency is required.

(iv) *Collusion and approval.* In the Legal Committee the question was raised who would decide the issue whether there had been a valid approval by the Contracting State, if the investor and the subdivision or agency agreed that there had been such approval, when in fact there had not.<sup>1</sup> It was pointed out that this really involved the problem of collusion.<sup>2</sup> The point is that the Contracting State may claim that no approval was given because it does not want an international decision on the dispute for reasons of its own in a case in which it would have no standing since the dispute was between the subdivision or agency and the investor. In such a situation the Contracting State must accept the position that the tribunal or commission will decide the question whether there has been approval or not like any other matter of jurisdiction. In particular, it may be pointed out that since the validity of approval by the Contracting State is not a matter subject to the agreement of the parties, the tribunal or commission can raise the issue of approval *proprio motu*.<sup>3</sup> If the Contracting State is not prepared to accept this position and take any risks flowing from it, it should not designate the subdivision or agency.<sup>4</sup>

(v) *Responsibilities and rights of the Contracting State.* The question may be asked whether a valid consent which is given by a designated constituent subdivision or agency and which is approved by a Contracting State, or in respect of which such State notifies the Centre that no approval is required, involves the Contracting State in any consequential responsibilities and rights in respect of the jurisdiction of the Centre.

(a) On the strength of the designation and approval, or notification that no approval is required, can the Contracting State be brought before the Centre, or itself invoke the Centre's jurisdiction, in regard to a dispute arising between that State and the investor in regard to that investment in respect of which the consent to the Centre's jurisdiction as between investor and subdivision or agency was given? For example, if the Contracting State interferes with the performance by the subdivision or agency of the investment agreement, can the investor found jurisdiction of the Centre in the dispute between him and the Contracting State on the basis of the consent of the designated subdivision or agency? It would seem that this will not be possible. Even though the Contracting State takes some action which enables a valid consent to the Centre's jurisdiction to be given by the subdivision or agency, this does not mean that the Contracting State itself has assumed any direct obligations in respect of the

<sup>1</sup> *History*, vol. 2, p. 860.

<sup>2</sup> *Ibid.*, *per* Mr. A. Broches.

<sup>3</sup> See above, p. 234, for this point.

<sup>4</sup> See *History*, vol. 2, p. 860, *per* Mr. A. Broches.

Centre's jurisdiction, flowing from the consent limited to the Centre's jurisdiction as between the investor and the subdivision or agency. That this is the position was in fact pointed out during the consultative meetings of legal experts.<sup>1</sup> Conversely, for analogous reasons, if a dispute arises between the Contracting State and the investor as a result of any action taken by the investor touching upon the investment, the Contracting State would not have the right to bring the investor before the Centre on the basis of the consent to the jurisdiction of the Centre as between the subdivision or agency and the investor.

(b) Does the Contracting State succeed to the rights and obligations of the subdivision or agency arising from the consent to the Centre's jurisdiction as between the investor and the subdivision or agency if the subdivision or agency is abolished by the Contracting State? It was suggested in the Working Group of the Legal Committee that this should be so, at any rate in respect of obligations.<sup>2</sup> This suggestion, however, was not taken up in the Legal Committee itself. Under the Convention as it stands, therefore, the answer to the question would depend upon the general law governing succession, and cannot be answered in simple terms. Moreover, this question must be treated separately from that of succession to the investment agreement, if any. The latter question may be governed by a municipal law or by international law, depending on the law applicable to the question in the circumstances of the case. The question of succession to the consent agreement will probably, however, depend entirely on international law. The consent agreement, being one which is made under and for the purposes of an international convention and being intended for the purpose of creating jurisdiction in an international tribunal, would be governed by international law.

The issue of succession in the circumstances envisaged is probably not susceptible of a single answer in international law. There is no substantive precedent on succession to consensual jurisdictional clauses, as far as can be gathered from the sources. There are many areas from which analogies may be drawn, but none seem to provide conclusive answers nor are they on all fours with the case under discussion. The situation under consideration may be compared with succession of States to treaties of other States or succession to treaties of their own subdivisions. In the first the general principle is that there is no succession, although there are exceptions to this, on the basis that treaty rights and obligations are personal and die with the legal person in whom they are vested.<sup>3</sup> In the second there is no applicable principle that is known to exist, and one based on the analogy of that which is viable in the first case may be applied. In the field of contracts, analogies may be sought from the succession of States to contracts of private persons or from the succession of individuals to contracts of other individuals in the law of State responsibility.

Also of some relevance are perhaps those cases concerning successors in

<sup>1</sup> Ibid., vol. 2, p. 411, *per* Mr. A. Broches.

<sup>2</sup> Ibid., vol. 2, p. 267.

<sup>3</sup> See A. D. McNair, *The Law of Treaties* (1961), pp. 600 et seq., D. P. O'Connell, *State Succession in Municipal and International Law* (1967), vol. 2, pp. 1 et seq., Waldock, 'Succession of States: Succession in Respect of Treaties', *International Law Commission Yearbook* (1970-II), p. 25 at pp. 31 et seq. and authorities there cited.

legal interest decided by arbitral tribunals and claims commissions set up under international *compromis*. In these cases the right of a successor in interest to appear before the tribunal or commission has been admitted.<sup>1</sup> Succession in interest here relates to a jurisdictional factor which may be compared to the case in hand because it also is concerned with the jurisdiction of the Centre over a successor party. On the other hand, these cases deal only with active jurisdictional capacity and not with passive jurisdictional capacity, e.g., the right to institute proceedings or make claims and not the obligation to defend claims. It may be argued, however, that this is a distinction without a difference once the principle of succession in interest is established, since variation may be admitted in the application of the principle.

The important point, however, is that the present case has three main features which distinguish it from the analogies mentioned above. First, the present case is one where the State terminates the existence of its subdivision or agency. In none of the relevant analogous cases has this occurred. This factor may be a very important one in determining the question of succession. Secondly, there is no succession to treaties here, nor yet is the jurisdictional contract to which succession might be claimed an ordinary contract which relates to a municipal legal system or a transnational system, but one of an international character originating and deriving its existence from an international convention.<sup>2</sup> Thirdly, the agreement under discussion here is one concerned with direct submission to the jurisdiction of an international tribunal, as opposed to the substance of a commercial transaction or transfer of territory, for example; and the issue raised does not arise directly under a *compromis* or agreement between States but as a result of direct agreement between an entity acting on behalf of a State and a private legal person.

For these reasons a novel approach to the problem may be warranted. While recognizing that there are cases in international jurisprudence where active jurisdictional capacity resulting from succession has been acknowledged, the contention may be advanced that the case under discussion demands an even more liberal approach which would enable succession rather than prevent it, particularly because the Contracting State has acted to dissolve the subdivision or agency which, moreover, was acting on its behalf. The limits of succession may be difficult to define, but much will probably depend on all the circumstances of the case. Particularly where, for example, explicit provision is made for succession by the Contracting State to the personality of the subdivision or agency, there would seem to be no reason for a tribunal or commission to refuse to recognize and give effect to such succession in regard to the agreement

<sup>1</sup> See *Hargous v. Mexico* (U.S.A. v. Mexico) (1876), Moore, *International Arbitrations*, p. 2327; *Estate of William E. Willet v. Venezuela* (U.S.A. v. Venezuela) (1885), Moore, *ibid.*, pp. 2254, 3743; *Guano case* (France v. Chile), *United Nations Reports of International Arbitral Awards*, vol. 15, p. 77.

<sup>2</sup> On the question of the law governing and the legal system relevant to State contracts, which is a very complex one, see F. A. Mann, *Studies in International Law* (1973), pp. 179 et seq., 211 et seq., 241 et seq. and 256 et seq., and Amerasinghe, *State Responsibility for Injuries to Aliens* (1967), pp. 105 et seq. and authorities there cited.



consenting to the Centre's jurisdiction. The same reasoning would apply where the necessary implication of the circumstances surrounding the abolition of the subdivision or agency is that a succession has taken place.

### C. THE REQUIREMENT THAT THE OTHER PARTY MUST BE A NATIONAL OF ANOTHER CONTRACTING STATE

According to Article 25 (1), the other party to a proceeding before the Centre must be 'a national of another Contracting State'. The term 'national of another Contracting State' is defined further in Article 25 (2).

#### (a) *Governments*

Are there any circumstances in which a government of another Contracting State may appear as the party described as a national of another Contracting State? For example, a Contracting State and one of its nationals may both participate in an investment operation in the host State. In such circumstances a dispute may arise between the host State on the one hand and the other Contracting State and the investor on the other, from one and the same set of circumstances and under one and the same investment agreement. It was suggested during the drafting of the Convention that it was desirable to provide for all three parties to be associated in proceedings before the Centre, because otherwise there might be two conflicting decisions in the same dispute.<sup>1</sup> The Convention, as it stands, however, does not provide for a State's government to appear in proceedings before the Centre even in these circumstances. One solution in such a case is, perhaps, for the two States to enter into an agreement that they will abide by the decision given in the proceeding between the host State and the investor.<sup>2</sup>

A second situation in which a government may want to appear in proceedings before the Centre is where a Contracting State has paid a claim of one of its nationals against the host State in circumstances in which it is subrogated to the rights of that national. This situation could arise where a Contracting State has given an investment guarantee to its national or has insured its national's investment under an investment insurance scheme. The point was raised at the earliest meetings of the Executive Directors of the World Bank,<sup>3</sup> and subsequently it was stated in a paper prepared by the General Counsel of the Bank for the Executive Directors that a government would have the right to appear in proceedings before the Centre in the circumstances described provided that the host State consented thereto.<sup>4</sup> The preliminary draft of the Convention made provision for a State to appear in proceedings before the Centre when it was subrogated to the rights of its national, and made no reference to the requirement of the host State's consent.<sup>5</sup> There were mixed reactions to this provision at the consultative meetings of the legal experts. Two delegations found the provision unacceptable,<sup>6</sup> while others supported the provision.<sup>7</sup> Some delegations

<sup>1</sup> *History*, vol. 2, p. 401.

<sup>2</sup> *Ibid.*, per Mr. A. Broches.

<sup>3</sup> *Ibid.*, vol. 2, pp. 62, 63.

<sup>4</sup> *Ibid.*, vol. 2, p. 78.

<sup>5</sup> Article II, section 1; *History*, vol. 2, p. 202.

<sup>6</sup> *History*, vol. 2, pp. 395, 404, 503.

<sup>7</sup> *Ibid.*, vol. 2, pp. 399, 497.

thought that, in addition to States, a multilateral investment guarantee fund should be given the capacity to be a party in proceedings before the Centre when subrogated to the rights of the investor.<sup>1</sup> Some delegations did not object to the idea of permitting a State benefiting from subrogation to appear in proceedings before the Centre, but wanted it to be made clear that such State would be precluded from preferring a claim under a bilateral agreement with the host State as well.<sup>2</sup> In the Legal Committee there was opposition from certain quarters to States or international institutions appearing in proceedings before the Centre even by virtue of subrogation after payment to nationals had been made,<sup>3</sup> based apparently on the considerations that it was outside the scope of the Convention to permit such subrogation, that such subrogation might impair diplomatic relations between the States concerned and that in certain countries sovereignty was a sensitive issue and the presence in proceedings of a State instead of an individual might give rise to political difficulties. Some members of the Committee supported the idea of subrogation but with qualifications. One qualification was that the state benefiting from subrogation should have renounced the right to pursue the inherited claim in any manner other than by proceedings before the Centre.<sup>4</sup> Another was that the subrogee should be brought into the picture before any payment had been made to the investor.<sup>5</sup>

The Legal Committee decided to retain the idea of subrogation, but in view of the small majority leading to this decision it was also decided to leave it to the Executive Directors finally to determine whether the idea should be retained or not. The draft article submitted to the Executive Directors<sup>6</sup> had four special features, namely that (i) subrogation was made subject to satisfaction of the claim of the investor; (ii) there had to be express consent on the part of the host State to such subrogation; (iii) such consent could be withdrawn before the State benefiting from subrogation gave certain written undertakings; and (iv) the latter must undertake (a) to be bound by the provisions of the Convention in the same way as the investor and (b) to waive recourse to any other remedy to which it might otherwise be entitled. The clause dealing with subrogation ran into opposition from some of the Executive Directors, particularly the Latin Americans.<sup>7</sup> In the result the Executive Directors decided to omit it.<sup>8</sup> It seems, therefore, clear that the absence in the Convention of specific mention of the capacity of States to appear in a subrogatory capacity in proceedings before the Centre now means that this is not possible.

#### (b) *Governmental agencies or corporations*

A different question is whether agencies of the State, wholly government-owned corporations, or companies in which the government has an equity or shares can qualify as nationals of other Contracting States. The comment in the

<sup>1</sup> *History*, vol. 2, pp. 257, 259.

<sup>3</sup> *Ibid.*, vol. 2, pp. 705, 710, 759, 760, 761, 762.

<sup>5</sup> *Ibid.*

<sup>7</sup> *Ibid.*, vol. 2, pp. 976 (Mr. Cano), 978 (Mr. Machado), 979 (Mr. Mejia-Palacio). Mr. Garba (Nigeria) also objected: *ibid.*, vol. 2, p. 978.

<sup>8</sup> *Ibid.*, vol. 2, p. 1018.

<sup>2</sup> *Ibid.*, vol. 2, p. 528.

<sup>4</sup> *Ibid.*, vol. 2, p. 759.

<sup>6</sup> *Ibid.*, vol. 2, p. 919.

preliminary draft of the Convention prepared for the consultative meetings of legal experts stated that partially or wholly owned government corporations could so qualify.<sup>1</sup> This interpretation of the term 'national' was not questioned either in the consultative meetings or in the Legal Committee. Nor did the Executive Directors make any comment.

Although the comment made in the preliminary draft is not repeated in the Report of the Executive Directors, it may reasonably be assumed that it is still a basic assumption of Article 25 (1) and (2). An entity of the kind under discussion may qualify as a juridical person which has the nationality of another Contracting State under Article 25 (2). Thus, as has been stated,

There are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but who are practically indistinguishable from the completely privately owned enterprise both in their legal characteristics and in their activities. It would seem, therefore, that for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function.<sup>2</sup>

It would also seem to be the case under the Convention that a tribunal or commission could ultimately decide whether a corporation or entity which has governmental participation could be regarded as 'a national of another Contracting State' for the purposes of the Convention, even though a host State had entered into a consent agreement with such a corporation or entity. Of course, such an agreement would be strong *prima facie* evidence that such a corporation or entity satisfied the requirements of the Convention.

### (c) *The nationality requirement*

The point was raised at one of the consultative meetings of legal experts that a definition of 'nationality', whether of a State or a Contracting State, would not be required because all that was needed was a rule of interpretation that consent to proceed under the Convention implied recognition by the host State that the other party had a foreign nationality.<sup>3</sup> Conversely, such a rule of interpretation could have been extended to raise the implication that the consent by the private party involved recognition on his part that he had the nationality of another Contracting State so as to prevent him from raising the issue of nationality as a defence. On the side of the host State it could then be assumed that each State might be relied on to ascertain to its own satisfaction whether an individual or an association of individuals (incorporated or unincorporated) was (a) one which from a legal and practical point of view was capable of assuming and discharging contractual obligations and (b) one which should be treated as a national of another Contracting State.<sup>4</sup> In this way the element of freedom of contract

<sup>1</sup> *Ibid.*, vol. 2, p. 230.

<sup>2</sup> A. Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of other States', *Recueil des cours*, 136 (1972-II), p. 332 at pp. 354-5.

<sup>3</sup> *History*, vol. 2, p. 450.

<sup>4</sup> *Ibid.*, vol. 2, p. 581.



would have obviated the need to lay down in the Convention detailed rules for treatment of problems connected with nationality.

However, the final result, in spite of the considerable confusion caused by the definitions offered, is that the Convention does contain some indicia of the meaning of 'national of another Contracting State'. The considerations advanced in the previous paragraph would seem to imply that, though a large measure of discretion is left to the parties to a consent agreement as a result of the consensual nature of the Centre's jurisdiction, there are certain 'outer limits' laid down in the Convention. Where these outer limits are not observed, firstly, it may mean that a party which has freely agreed to submit to the Centre's jurisdiction may renege on its agreement and claim that the Centre has no jurisdiction on the basis that the private party is not a national of another Contracting State, as is possible in the case of any other jurisdictional limitation *ratione personae* which circumscribes the element of free consent. Secondly, a tribunal or commission may *proprio motu* or at the instance of one of the parties find that it has no jurisdiction because one or other element in the definition has not been satisfied, in spite of the fact that the two parties had freely agreed to submit to its jurisdiction. On the other hand, in applying the definitions it would be possible for a tribunal or commission to appreciate that the real basis of its jurisdiction is the consent of the parties, to make every effort to give effect to a consent to jurisdiction which has been validly concluded and, in interpreting some of the concepts, to leave ample room for agreement between the parties as to what these concepts mean. In short, a tribunal or commission could follow the principle that a consent freely given should be given effect and not hobbled by literal or technical considerations. The principle that restrictions on a State's sovereignty are not lightly to be presumed would not really be violated in so far as terms which have not been clearly defined are being interpreted in a situation where what is at issue is jurisdiction based on the free consent of a sovereign State.

The remarks made above are particularly relevant to the definition of nationality in the term, 'nationals of other Contracting States'. The concept of nationality is used without further definition. It should be borne in mind, it is submitted, that the meaning of the term nationality in the context of Article 25 (2) may not be identical with the meaning of the term for the law of diplomatic protection. In the latter field the purpose of nationality is to establish an adequate link between the private party and the State giving protection in order to enable the latter to espouse his claim. Hence, there is reason to insist on a particularly *meaningful* link, and it may very well be that in certain circumstances nationality conferred by the laws of the State concerned may be inadequate.<sup>1</sup> In the case of the Convention the role of nationality is different. It serves as a means of bringing the private party within the jurisdictional pale of the Centre. There is no question of diplomatic protection, nor is it by virtue of a State's right to exercise

<sup>1</sup> See the *Nottebohm* case, *I.C.J. Reports*, 1955, p. 4. In a different sense the effect of the decision in the *Barcelona Traction Co.* case, *I.C.J. Reports*, 1970, p. 3, was to restrict the situations in which national States could exercise diplomatic protection.

diplomatic protection over a private party that he has the capacity to appear in proceedings before the Centre.<sup>1</sup>

(d) *Certification of nationality*

The preliminary draft of the Convention prepared for the consultative meetings of legal experts stated that a written affirmation of nationality signed by or on behalf of the Minister of Foreign Affairs of the State whose nationality is claimed by the private party would be conclusive proof of the facts stated therein. The article was fully supported by only one, African, expert at these meetings.<sup>2</sup> Otherwise it ran into overwhelming opposition from experts on various grounds. Some thought that, as this provision left the issue entirely in the hands of the investor's State, it was weighted too heavily in favour of the investor,<sup>3</sup> besides encouraging investors to assume nationalities of convenience so as to enable them to bring the State of their effective nationality before the Centre.<sup>4</sup> Others felt that it could prejudice the investor's chances since, if the State was unwilling to or could not give a proper certificate, he would not be able to resort to other means to prove his nationality.<sup>5</sup> Further points raised were: (i) that the complex legal nature of the status of nationality and the amount of investigation required to support it might make it difficult, if not impossible, in some cases to reach a definite conclusion on the issue and, therefore, to grant a certificate of this type;<sup>6</sup> (ii) that the certificate should relate to citizenship which was an internal status rather than to nationality which was a status having international legal implications;<sup>7</sup> (iii) that the nationality of a party might be relevant to determining the law applicable in the dispute and, therefore, ought not to be determined by the unilateral act of the investor's State;<sup>8</sup> and (iv) that the Minister of Foreign Affairs should not be specified as the competent authority, since in some countries other authorities might be competent.<sup>9</sup> It was suggested by several experts that in any case the certificate should only be *prima facie* evidence of nationality.<sup>10</sup> It was suggested also that the question of nationality could be referred to the International Court of Justice,<sup>11</sup> but this suggestion was not pursued. Ultimately the provision regarding proof of nationality was completely omitted.

In the absence of any special provision on the proof of nationality, the tribunal or commission, being judge of its own competence, has power to decide whether for the purposes of vesting it with jurisdiction the private party has the nationality requirement as set down in Article 25 (2).

<sup>1</sup> It has been said the private party is required to be 'a national of a Contracting State' in order to make it possible to enforce an award against him because his assets would usually be in his national State or because it is required by the principle of mutuality and reciprocity. While this may be true, such a statement was not intended to mean that nationality should be defined in terms of the location of assets or any other such criterion.

<sup>2</sup> *History*, vol. 2, p. 295.

<sup>3</sup> *Ibid.*, vol. 2, pp. 256, 323.

<sup>4</sup> *Ibid.*, vol. 2, p. 582.

<sup>5</sup> *Ibid.*, vol. 2, p. 527.

<sup>6</sup> *Ibid.*, vol. 2, p. 394.

<sup>7</sup> *Ibid.*, vol. 2, p. 539.

<sup>8</sup> *Ibid.*, vol. 2, p. 256.

<sup>9</sup> *Ibid.*, vol. 2, pp. 325, 356, 397, 507.

<sup>10</sup> *Ibid.*, vol. 2, pp. 256, 394, 397, 506.

<sup>11</sup> *Ibid.*, vol. 2, p. 324.

(e) *Natural persons*

According to Article 25 (2) the non-State party to the dispute must be a natural or juridical person which has the nationality of a Contracting State other than the State party to the dispute. In the case of natural persons there is a further requirement that the non-State party may not have the nationality of the State party to the dispute. This means that there is a negative and a positive requirement. The reason for the negative requirement is that the Convention establishes international mechanisms for the settlement of disputes by offering protection to aliens against the host State and there is no reason to have these international procedures as a substitute, even on an optional basis, for domestic procedures for the settlement of disputes between States and their own nationals. The positive requirement, namely nationality of another Contracting State, is justified, among other things, by the mutuality principle embodied in the Convention in balancing the interests of host States on the one hand and investors on the other, particularly with regard to the enforcement of awards (Article 54 (1)) and the suspension of the right to exercise diplomatic protection (Article 27 (1)).<sup>1</sup>

The question of statelessness was raised at one of the consultative meetings<sup>2</sup> where it was said that the Convention does not take care of the situation of statelessness, and it seems to have been the general view by implication that in the usual case stateless persons should not have *locus standi* in proceedings before the Centre. A stateless person would thus not have access to the Centre, because he does not have the nationality of another Contracting State, unless for some reason such nationality is attributed to him, though the State does not recognize it.<sup>3</sup>

(i) *Definition of nationality.* As has been pointed out earlier, the term nationality is not defined in the context of the requirements that a natural person must have the nationality of another Contracting State and may not have the nationality of the host State. Consequently, the question may be raised as to what is meant by the term.

In customary international law the position generally is that the law of the State whose nationality is claimed determines whether the claimant is a national of that State. There may be cases in which States do not use the concept of nationality in their domestic law but some other concept, such as citizenship. But in such cases international tribunals would try to ascertain how far in substance the State concerned regards the person as having a link with it which can be characterized as being nationality. In this process the definition of nationality given by the International Court of Justice in the *Nottebohm* case could prove helpful. There it was stated that:

Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.<sup>4</sup>

<sup>1</sup> See further A. Broches, loc. cit. (above, p. 243 n. 2), at p. 356.

<sup>2</sup> *History*, vol. 2, p. 701.

<sup>3</sup> See below, p. 247.

<sup>4</sup> *I.C.J. Reports*, 1955, p. 4 at p. 23.



Where municipal law is not explicit as to the fact of nationality an international tribunal may apply this definition in deciding whether, according to a particular State's law, a person is a national of that State. Difficulties may arise in ascertaining the effect of particular laws because of the complexity of legal concepts in a given legal system, such as where there are different kinds of citizenship or a distinction is made between citizenship and nationality, but ultimately an international tribunal must come to its own conclusions on the basis of its own appreciation of the concept of nationality. In the absence of any coherent rules on nationality in a given legal system, international tribunals have in the past determined that persons have had the nationality of a State on the basis of the above principles, even though it may not have been entirely clear whether the law of that State regarded them as nationals,<sup>1</sup> and sometimes even where they were not regarded as citizens for domestic purposes.<sup>2</sup>

The difficulty with any complete definition of nationality, whether in terms of a municipal law or otherwise, is that, though the term is drawn from municipal law, it is not used consistently by municipal legal systems, nor is it always used with an international significance. In view of this, a tribunal may well be justified in disregarding the use of the concept domestically, especially where a State tends to disqualify a person, and determine nationality on the basis, for instance, of whether a person is regarded as falling for all purposes within the personal jurisdiction of that State. In the case of the Convention, these considerations might be said to apply even more cogently where a tribunal or commission is trying to determine whether it has jurisdiction over a natural person, particularly because what is required is not the establishment of a link such as would entitle a Contracting State to exercise diplomatic protection, which may require a positive attitude towards nationality at least on the part of that State and also a more significant connection, but only a relationship with a Contracting State such as would be sufficient to predicate the exercise of jurisdiction based on consent. In short, it is conceivable that a tribunal or commission may hold that a person has the nationality of a Contracting State, irrespective of whether such State claims him to be its national for other purposes on the international plane. Indeed, there is no requirement that the private party must prove that the Contracting State does in fact make this claim. The decision could be reached, it is submitted, by the application of a general concept requiring a link probably somewhat similar to that outlined in the *Nottebohm* case cited above, due consideration being given to the law of the Contracting State.

Article 27 (1), which precludes any Contracting State from exercising diplomatic protection in respect of one of its nationals who is a party to a dispute and has consented to submit it to arbitration before the Centre—unless the other party refuses to carry out the award rendered by the tribunal—does not

<sup>1</sup> *Cayuga Indians (G.B.) v. U.S.A.* (1926), *United Nations Reports of International Arbitral Awards*, vol. 6, p. 173.

<sup>2</sup> *Kahane (Successor) v. Parisi and the Austrian State*, *Annual Digest*, 5 (1929-30), p. 213 (Case no. 131).

militate against an interpretation of the term 'nationality' on the lines suggested above.

(ii) *Possible limitations.* In the course of determining whether a person has or has not the relevant nationality, a tribunal or commission may well decide to ignore a nationality involuntarily acquired by that person or a nationality of convenience. The possibility of ignoring a nationality involuntarily acquired was mentioned at the consultative meetings,<sup>1</sup> by governments<sup>2</sup> and in the Legal Committee.<sup>3</sup> Thus, it could well happen that a person who has involuntarily acquired the nationality of the host State will be regarded as not having the nationality of that State for the purposes of Article 25 (2); or that a person who has involuntarily acquired the nationality of another Contracting State would not be regarded as having the nationality of that Contracting State for the purposes of the same article. Such a rule could clearly work both ways: against the assumption of jurisdiction as well as in favour of it.

Similarly, a tribunal or commission may refuse to recognize a nationality of 'convenience'. It would seem from the *Nottebohm* case<sup>4</sup> that international law does to some extent, at least, delimit the power of a State to claim a person as its national. This is the converse of the situation where international law may take the view that a person does have the nationality of a State although the laws of that State are not explicit or the situation is confused. In the *Nottebohm* case the International Court of Justice held that the bond of attachment between X and State A was not so strong as to be the real and effective qualification for nationality which would entitle State A to claim the right of diplomatic protection. There are two distinguishing characteristics about this decision, however, which are relevant to the question how far the doctrine of the 'effective link' is likely to be applied by a tribunal or commission in determining its jurisdiction under the Convention. First, the decision related to nationality for the purposes of diplomatic protection and did not pass upon issues of nationality for other purposes. Secondly, in that case (a) *Nottebohm* had already had German nationality, which he had lost, and (b) the action by the State of his present nationality, Liechtenstein, was against a third State, Guatemala, with which *Nottebohm* had for some time had and at the material time did actually have a closer connection than he had with either Liechtenstein or Germany.<sup>5</sup> This may

<sup>1</sup> *History*, vol. 2, p. 445.

<sup>2</sup> *Ibid.*, vol. 2, p. 658 (Malagasy Republic).

<sup>3</sup> *Ibid.*, vol. 2, pp. 705, 868, 874, 876, 877.

<sup>4</sup> *I.C.J. Reports*, 1955, p. 4.

<sup>5</sup> See the comments on the *Nottebohm* case in J. M. Jones, 'The *Nottebohm* Case', *International and Comparative Law Quarterly*, 5 (1956), p. 230. The narrow view of the decision taken here is supported to a high degree by the approach to the case taken in the *Flegenheimer* claim (U.S.A. v. Italy, 1958), I.L.R. 25 (1958), p. 91 at p. 148, where it was said that the 'effective link' could operate only in favour of Guatemala, the defendant State with which the individual had a closer connection than with Liechtenstein, the claimant State. In that case it was held that Italy could not oppose the U.S. nationality of an individual in a situation where the individual had acquired U.S. nationality, having been a German and having closer connections with Germany than with the U.S.A. The notion of a 'close connection' was, however, approved in a case decided by the Court of Appeal of Berlin where a person resident and living in Switzerland was held not to have Roumanian nationality which he had once had and lost and which had been compulsorily conferred on him subsequently. This case, it must be noted, concerned compulsory acquisition of nationality: *North Transsylvania Nationality* case (1965), I.L.R. 43 (1971), p. 191.

make the case of limited relevance to the question of nationality in relation to the Centre's jurisdiction and may restrict for that purpose the scope of the notion of an 'effective link'. There is a distinction between diplomatic protection and jurisdiction for the purposes of the Convention; hence, the meaning of nationality may be different in the two cases. Moreover, even if the *Nottebohm* case were to be used as an applicable precedent, it is arguable that the absence of an effective link is relevant to negating the existence of a nationality only in the particular circumstances of that case, or at any rate, in very limited circumstances.<sup>1</sup> Conceivably, where the nationality of a Contracting State is assumed by a person when he does not have a reasonable connection with that State just before the consent to jurisdiction is given and in circumstances in which both he has lost the nationality of a non-Contracting State by that act and his closest connection has been for some time with the host State, it might be held that he does not have the nationality of a Contracting State for the purposes of the Centre's jurisdiction. But what if the change of nationality was from that of one Contracting State other than the host State to another's, or if the new nationality was acquired from a condition of statelessness? In such a case the answer may well be different for the purpose of the Centre's jurisdiction. Certainly, if his closest connection has not been with the host State, it is submitted that a tribunal or commission would be justified in not disregarding the nationality of the person.

In the case of a nationality acquired by fraud or mistake, the usual rules of international law would presumably operate to make such nationality ineffective.

(iii) *The effect of agreement or recognition.* The fact that the host State has agreed, at the time of the consent to the Centre's jurisdiction, on the nationality of a natural person, or has tacitly recognized that he had the nationality of a particular Contracting State, may have some effect on the decision of a tribunal or commission regarding its jurisdiction. The predominantly consensual nature of the Centre's jurisdiction<sup>2</sup> does mean that an agreement of this nature would have some value. It is submitted that agreement or recognition of this type would raise a presumption that the natural person had the nationality concerned and, at least, the burden of proving otherwise would rest on the party claiming otherwise.

It is further submitted that while it is ultimately for a tribunal or commission to decide on questions of nationality in the exercise of the power to determine its own competence, it will not lightly disregard an agreement or tacit recognition of nationality by the host State. On the other hand, it is clear that if, for example, the host State and the private party agree that the private party has the nationality of State X when according to the law of State X and on the facts the private party manifestly does not have that nationality, the tribunal would decide that the private party did not have the nationality of State X, and it could do this *proprio motu*.

It is a difficult question to decide what is the effect of such agreement or recognition where nationality has been acquired in circumstances in which

<sup>1</sup> See, e.g., the *North Transsylvania Nationality* case (1965), I.L.R. 43 (1971), p. 191.

<sup>2</sup> See *Report of the Executive Directors*, p. 8.



it would have been disregarded had there been no such agreement or recognition, because of the absence of an effective link. It may well be successfully argued that the agreement or recognition of the host State in such a case estops it from relying on the absence of the effective link to negate the effectiveness of such nationality, unless it was unaware at the time of such agreement or recognition of the facts which constituted the lack of the effective link, and that the tribunal or commission would not disregard such nationality. Again, where there is fraud either in inducing the agreement on or recognition of nationality or in the acquisition of the nationality, the agreement or recognition by the host State would not preclude the tribunal or commission from disregarding such nationality.

These are only some examples of what the effect of agreement or recognition by the host State might be on the question of nationality. It is difficult to suggest a general principle or general principles on which a tribunal or commission might act because so much would seem to depend on the circumstances of each case. However, it may be tentatively suggested that the fact of agreement or recognition by the host State should be regarded as especially supporting the conclusion that the nationality of the private party is as agreed unless there is good reason to decide otherwise, because of the basically consensual nature of the Centre's jurisdiction.

(iv) *Multiple nationality.* (a) In the earlier drafts there was no provision that a natural person party to proceedings must not have had the nationality of the host State. In fact, Article X (2) of the preliminary draft provided that a national of another Contracting State could consent to appear in proceedings before the Centre notwithstanding that he had the nationality of the host State,<sup>1</sup> thus leaving it to the host State to agree with a person who had its nationality that he would be regarded for this purpose as having only the nationality of the other Contracting State. This feature was objected to by several experts at the consultative meetings,<sup>2</sup> by a government<sup>3</sup> and by some members of the Legal Committee.<sup>4</sup> On the other hand, some experts and members of the Legal Committee were prepared to accept a modified version. One suggestion was that the possession of the nationality of the host State should not be an obstacle to the Centre's jurisdiction provided the nationality of the other Contracting State was the effective nationality.<sup>5</sup> Another suggestion was that the possession of the host State's nationality, being one of two nationalities, should only preclude the Centre's jurisdiction where the host State had been unaware that the person had its nationality.<sup>6</sup> Thirdly, it was suggested that a person possessing the nationality of the host State should be able to initiate proceedings against that State only where (a) the host State specifically agreed and (b) such nationality was one of convenience.<sup>7</sup> Fourthly, the view was expressed that the nationality of the host State should be a disqualification only if it was voluntarily

<sup>1</sup> *History*, vol. 1, p. 122.

<sup>2</sup> *Ibid.*, vol. 2, pp. 256, 284, 285, 325, 394, 396, 397, 398, 400, 445, 538.

<sup>3</sup> *Ibid.*, vol. 2, p. 538.

<sup>5</sup> *Ibid.*, vol. 2, pp. 400, 876.

<sup>7</sup> *Ibid.*, vol. 2, p. 708.

<sup>4</sup> *Ibid.*, vol. 2, pp. 707, 708, 709, 840, 876, 878, 879.

<sup>6</sup> *Ibid.*, vol. 2, p. 445.

acquired and retained after the date of consent to jurisdiction by the natural person.<sup>1</sup> There was apparently some support for the view that nationals of the host State should not be precluded from appearing in proceedings before the Centre provided only that they also had the nationality of another Contracting State.<sup>2</sup>

Finally, it was agreed that a natural person who was a national of the host State should not have *locus standi* in proceedings before the Centre, even if he had the nationality of another Contracting State. Thus, in the case of dual or multiple nationality under the Convention, if one of the nationalities is that of the host State, neither agreement on the part of the host State nor the fact that the nationality of another Contracting State was the 'effective' nationality nor the fact that the host State was aware of the fact that the person had its nationality nor any other fact would normally assist to give the Centre jurisdiction. There is one situation, it is submitted, where the possession of the host State's nationality would not be an obstacle, namely where for special reasons it is held that such nationality should be disregarded and the person should be treated as if he did not have such nationality, as where, in certain circumstances he has a nationality of convenience.<sup>3</sup>

(b) Where a multiple nationality situation arises as a result of the person's having two or more foreign nationalities, there is no question normally of a choice being made between or among these nationalities in order to determine whether the person has the required nationality. What the Convention requires is that the person should have the nationality of another Contracting State, irrespective of whether he also has the nationality of a third Contracting State or of a non-Contracting State. Theories of 'master' or 'effective' nationality are, therefore, in contrast to the case of diplomatic protection, not relevant in this situation. This was impliedly recognized in the discussions at the consultative meetings and in the Legal Committee. It is submitted, however, that the person may be without *locus standi* in certain circumstances in proceedings before the Centre where he has dual or multiple nationality, including the nationality of another Contracting State, because that nationality is not recognized, as in certain cases where that nationality is one of convenience.<sup>4</sup>

In the case where one of the multiple nationalities is that of a non-Contracting State, the host State may, in addition to being subjected to a proceeding before the Centre, be confronted with a diplomatic claim by the non-Contracting State on behalf of its national, since such State would not be bound by the provisions of Article 27 (1) of the Convention. In such a situation, the host State might in appropriate circumstances raise the issue of 'effective' or 'master' nationality. On the other hand, if such an argument could not be applied on the facts, the non-Contracting State could well be met by the argument that the host State has submitted to the jurisdiction of the Centre in respect of the claim

<sup>1</sup> Ibid., vol. 2, p. 877.

<sup>2</sup> Ibid., vol. 2, pp. 538, 878.

<sup>3</sup> See above, pp. 248 et seq. This would be in accordance with the *ratio decidendi* of the *Nottebohm* case.

<sup>4</sup> See above, pp. 248 et seq.

and is, therefore, taking appropriate steps to settle the dispute in an international forum.

(v) *Relevant time.* In the preliminary draft prepared by the World Bank it was necessary that the nationality requirements, both positive and negative, relating to natural persons be fulfilled only on the date on which the consent to the Centre's jurisdiction was given.<sup>1</sup> There was some discussion of this provision at the consultative meetings. It was supported by some experts.<sup>2</sup> Others, however, felt that there was a danger, inherent in the rule as stated, that an investor earlier recognized as foreign might later voluntarily change his nationality to that of the host State and still be at liberty to bring that State before the Centre, since his 'foreignness' at the time of contracting would prevail.<sup>3</sup> It was suggested that the relevant times for fulfilment of the nationality requirement be both the time of contracting as well as immediately prior to the award,<sup>4</sup> or, alternatively, that the two relevant times be the time of contracting and the time application was made for the institution of proceedings,<sup>5</sup> and, further, that there be continuity of foreign nationality from the time of contracting to a later time<sup>6</sup> or even throughout the proceedings.<sup>7</sup> In view of the comments against a single date for the fulfilment of the nationality conditions for a variety of reasons, the next draft contained a provision that the nationality requirement be fulfilled on two dates, namely the date on which the consent to jurisdiction was given and the date on which the proceedings were instituted.<sup>8</sup> Two governments felt that there should be only one date, one choosing the date of consent to jurisdiction,<sup>9</sup> and the other the date on which proceedings were begun.<sup>10</sup> Other relevant dates suggested in the Legal Committee were the date on which the investment was made<sup>11</sup> and the date of the event giving rise to the dispute.<sup>12</sup> It was also suggested in the Legal Committee that though the relevant time for the possession of foreign nationality was the date of consent to jurisdiction, it should also be provided that the person should not after that date voluntarily acquire and retain the nationality of the host State.<sup>13</sup>

The final version of the Convention provides that the nationality requirement must be fulfilled both at the time of the consent to jurisdiction as well as at the time at which the request for arbitration or conciliation is registered. In view of the fact that many ideas proposed at the earlier stages were rejected, certain points may be emphasized about the current version of the Convention. First, it is clear that no more nor less than the two dates mentioned are relevant for the fulfilment of the nationality requirements. Secondly, both the negative and positive nationality requirements must be fulfilled on both these dates, and it would be inadequate that both were fulfilled on one date but only one on the other. Thirdly, there is no requirement of continuity in respect of the requirements so that it is not necessary that either the positive requirement or the negative requirement be satisfied continuously from the first date to the second.

<sup>1</sup> Article X (2).

<sup>4</sup> Ibid., vol. 2, p. 538.

<sup>7</sup> Ibid., vol. 2, p. 395.

<sup>10</sup> Ibid., vol. 2, p. 658.

<sup>12</sup> Ibid., vol. 2, p. 877.

<sup>2</sup> See, e.g., *History*, vol. 2, p. 539.

<sup>5</sup> Ibid., vol. 2, p. 445.

<sup>8</sup> Ibid., vol. 1, p. 124.

<sup>3</sup> Ibid., vol. 2, p. 582.

<sup>6</sup> Ibid., vol. 2, p. 538.

<sup>9</sup> Ibid., vol. 2, p. 661.

<sup>11</sup> Ibid., vol. 2, p. 708.

<sup>13</sup> Ibid., vol. 2, pp. 876-7.



All that is required is that both the positive and negative conditions be satisfied on each of the two dates. Fourthly, there is no requirement that the natural person must have the same foreign nationality on the two dates. In more than one respect, therefore, there is a difference between the law of diplomatic protection and the law of the Convention. In the former, for instance, the alien must have the same foreign nationality continuously between two relevant dates. In the latter it is sufficient that the natural person has the nationality of any Contracting State other than the host State on the two dates. Similarly, in the law of diplomatic protection the alien must *not* have the nationality of the host State continuously from the first date to the second, while under the Convention there is no need for such continuity, it being sufficient that the natural person does not have such nationality on each of the two relevant dates. In the law of diplomatic protection the second relevant date is doubtful. It may be the date of institution of proceedings or the date of the award. Under the Convention the second date is neither of these dates but definitely the date of registration of the request.

A problem may arise if at the date of the request for institution of proceedings the private party satisfies the nationality requirement but ceases to do so without the knowledge of the Secretary-General before the request is registered. The Secretary-General will register the request on the basis of the information relating to nationality contained in it but this does not preclude an objection to the jurisdiction of the Centre being raised before the tribunal or commission, on the basis that the nationality requirement has not been satisfied, because the second relevant date is the date of registration of the request and not the date of the filing of the request.

(f) *Juridical persons*

In the case of a juridical person, the requirement of Article 25 (2) (b) is that such a person must have the nationality of a Contracting State other than the host State on the date of consent to the jurisdiction of the Centre or that if it has the nationality of the host State, the parties must have agreed that because of foreign control it should be treated as a national of another Contracting State.

(i) *Meaning of juridical person.* The term 'juridical person' is not defined in the Convention. It must lie, therefore, within the competence of a tribunal or commission to decide whether an entity is a juridical person to which the nationality requirements of Article 25 (2) (b) apply or not. If the entity does not fall into this category, the component natural persons will have to be dealt with each under Article 25 (2) (a). If the component persons include juridical persons then each of them will have to be dealt with under Article 25 (2) (b) and the natural persons will have to be considered under Article 25 (2) (a).

At the consultative meetings the point was made by one expert that the term 'company' should not be extended to cover a mere association of persons such as unincorporated partnerships.<sup>1</sup> The question as to what was meant by the term 'juridical person' was also raised by one government.<sup>2</sup> On the other hand,

<sup>1</sup> Ibid., vol. 2, p. 538.

<sup>2</sup> Ibid., vol. 2, p. 661.

it was made quite clear at the consultative meetings that it was desirable to keep the definition of 'juridical persons' as neutral as possible in order to take into account the fact that States might differ in the way national laws treated associations, groups, etc.,<sup>1</sup> and also that it would be a matter for the host State to decide at the time it consented to the Centre's jurisdiction whether an association or group should be treated as having personality and therefore a nationality or whether the individuals forming it should be dealt with directly because it was not a juridical person having nationality.<sup>2</sup> This approach leaves much to the discretion of the host State. On the one hand, it is clear that where the host State decides to deal with the individuals forming a group or association, it can legitimately do so, and that too for the reason that it regards the association or group as not having juridical personality, but without necessarily having to decide that question with finality. On the other hand, the related question is raised whether the fact that the host State has decided to treat the other party as a juridical person precludes the issue whether the other party is a juridical person or a plurality of persons from being raised before a tribunal or commission. Because of the consensual basis of jurisdiction under the Convention, it is perhaps a good argument that the recognition by the host State of the other party's juridical personality has some effect. In general a tribunal or commission can be expected to give considerable weight to such recognition. However, it is submitted, there may be circumstances in which a tribunal or commission could disregard such an election. Apart from cases of fraud and similar circumstances leading to mistake, an adjudicating body may well decide to disregard such an election where, for instance, it is clear that neither according to the law of the host State nor according to the law of the State whose nationality is claimed does the party have juridical personality. Nevertheless, it would generally be only in extreme cases that a tribunal or commission would disregard a choice made by the host State.

(ii) *Nationality of juridical persons.* How is the nationality of a juridical person determined for the purposes of Article 25 (2) (b)? There was much discussion of this question before the present text was evolved.

Initially, it was suggested in the preliminary draft that any company which under the domestic law of a State was its national and any company in which the nationals of a State had a controlling interest would qualify to be nationals of a State, though these two instances were not the only ones in which a company could be regarded as a national of a State.<sup>3</sup> The examples set out in the draft were objected to by some experts at the consultative meetings because the meaning of 'controlling interest' was insufficiently precise.<sup>4</sup> It was, therefore, suggested that the 'control' test be omitted and in those circumstances the host State be left to enter into arrangements with the foreign individuals having an interest in the company rather than the company itself.<sup>5</sup> Some experts, however, felt that the list of examples should be retained because the control test would not be workable where the company in the host State was owned by a large

<sup>1</sup> *History*, vol. 2, p. 359.

<sup>4</sup> *Ibid.*, vol. 2, p. 361.

<sup>2</sup> *Ibid.*, vol. 2, p. 284.

<sup>3</sup> *Ibid.*, vol. 1, p. 122.

<sup>5</sup> *Ibid.*, vol. 2, pp. 446, 447, 448, 538.

number of individual foreign shareholders.<sup>1</sup> Further, some experts felt that a host State would be averse to recognizing that companies having its nationality should be regarded as having foreign nationality because of 'control',<sup>2</sup> while others felt that because host States required foreign-owned companies to be locally incorporated, if such companies could not be treated as foreign, a growing proportion of foreign investment would be kept outside the Convention.<sup>3</sup>

In the next draft the position was taken that apart from juridical persons having the nationality of another Contracting State, such juridical persons as the parties had agreed should be treated as nationals of another Contracting State should be regarded as such nationals.<sup>4</sup> One government took objection to the latter provision.<sup>5</sup> In the Legal Committee the same provision met with opposition from several delegates from developing countries.<sup>6</sup> On the other hand, it was at one stage suggested that nationality should be described in terms of effective nationality.<sup>7</sup> A majority, however, supported the position that juridical persons which do not have the nationality of any Contracting State should be excluded from the benefits of the Convention.<sup>8</sup> Ultimately, the position that corporations which were nationals of the host State could have the required nationality, if the parties so agreed, because of foreign control, was incorporated in the final version.<sup>9</sup>

The Convention thus requires that either the juridical person must have the nationality of a Contracting State other than the host State, or, if it has the nationality of the host State, it must have been agreed between the parties that because of foreign control it has the nationality of a Contracting State other than the host State.

It has been questioned whether a juridical person can have more than one nationality, but if this is possible, it is clear that if one of the nationalities that it has is that of the host State, then there must be an agreement between the parties based on foreign control of a foreign nationality. This is implicit in the formulation of Article 25 (2) (b).

What is meant by 'nationality' of a juridical person is not further defined. One point emerges from the formulation of Article 25 (2) (b). This is that in answering the question whether a juridical person has the nationality of the host State, a 'control' test cannot be applied. Whether a juridical person has the nationality of the host State must be decided by some other test such as the country of incorporation or the *siège social*, etc. Similarly, the 'control' test cannot be applied initially to establish a nationality other than that of the host State, where it is found that the nationality is that of the host State according to some other test. If this were not the case, the second part of Article 25 (2) (b) would not make sense.

Further, in view of the fact that Article 25 (2) (b) is framed as it is and so

<sup>1</sup> Ibid., vol. 2, pp. 361, 447, 448.

<sup>2</sup> See *ibid.*, vol. 2, p. 581.

<sup>3</sup> See *ibid.*, vol. 2, p. 581.

<sup>4</sup> Ibid., vol. 1, p. 124.

<sup>5</sup> Ibid., vol. 2, p. 658.

<sup>6</sup> Ibid., vol. 2, pp. 706, 709, 710, 840.

<sup>7</sup> Ibid., vol. 2, p. 876.

<sup>8</sup> Ibid., vol. 2, p. 868.

<sup>9</sup> See also A. Broches, *loc. cit.* (above, p. 243 n. 2), at pp. 359-60.



much importance is attached in it to the nationality of the host State, the question may be asked whether it is not implied that there should be some specific procedure for determining the issue of nationality of juridical persons. Conceivably the question should first be asked whether the juridical person initially has the nationality of the host State, for which purpose the 'control' test cannot be applied. If the answer to that question is in the negative, then the second question may be asked whether it has the nationality of a Contracting State other than the host State.

At this stage of the analysis, several questions are raised. First, if the 'control' test cannot be applied in determining whether a juridical person has the nationality of the host State, how else can the nationality of the host State be established? Secondly, in relation to the first part of Article 25 (2) (b), how can the nationality of a juridical person be established? Thirdly, in this connection can the 'control' test be used to determine the person's nationality, since it is not being used to establish that the person has or does not have the nationality of the host State? Fourthly, can a juridical person have more than one nationality for the purposes of the Convention, particularly where these are not nationalities of the host State? Fifthly, if this be possible, what happens in the case of multiple nationality? Sixthly, what is the effect of agreement between the parties on the question of nationality?

(iii) *The applicable tests.* In determining whether the nationality of a juridical person is that of the host State, a preliminary question arises whether the criteria for establishing the nationality of a juridical person for the purposes of diplomatic protection are relevant, apart, that is, from the criterion of 'control', if indeed that is applicable in the law of diplomatic protection.<sup>1</sup> It has already been explained that diplomatic protection is to be distinguished from eligibility or ineligibility under the Convention; consequently in the matter of the Centre's jurisdiction, the law of diplomatic protection, though it should be considered, may neither be automatically nor exactly applicable.

In any case it would appear that there is no single and exclusive test which is used to determine the nationality of juridical persons, whether for the purposes of diplomatic protection or otherwise, since different tests have been applied in different circumstances in determining the issue.<sup>2</sup> A variety of tests has been used in the conflict of laws, in municipal law, and in international law, depending on the purpose, in determining the nationality of a corporation. In the conflict of laws the place of incorporation, the place of the registered office, the place of central administration or effective seat or the place where the principal activities of the juridical person are conducted may determine the nationality of the juridical person for the purpose of determining personal status, and the multiplicity of criteria may give rise to conflict between legal systems. In applying municipal law to aliens, for example in connection with the treatment of enemy property, the place of incorporation test has been applied, yet also, in

<sup>1</sup> See the *Barcelona Traction* case, *I.C.J. Reports*, 1970, p. 3 at p. 48 on this point.

<sup>2</sup> See Van Hecke, 'Nationality of Companies Analysed', *Nederlands Tijdschrift voor International Recht*, 8 (1961), pp. 223 et seq.

certain circumstances, the 'control' test has been applied. In the implementation of legislation barring aliens from certain occupations or concerning war damage, a 'control' test has been applied to determine whether a juridical person is an alien. In international law, for the purpose of claiming benefits under treaties, the place of incorporation is usually the test applied to determine the nationality of juridical persons, while sometimes a 'control' test may be applied. In the law of diplomatic protection the place of incorporation or the place of registration or the place of central administration or effective seat has usually determined the nationality of corporations but sometimes here also a 'control' test has been applied.<sup>1</sup>

Since a tribunal or commission constituted under the Convention need not necessarily apply the international law of diplomatic protection in deciding its jurisdiction under the Convention, it may be that it could adopt a flexible approach in deciding what the nationality of a juridical person is for this purpose. It could conceivably apply some test other than that of the place of incorporation or of the registered seat, for example.<sup>2</sup> In any event, it should be noted, where the juridical person is not incorporated but nevertheless claims to be a juridical person, the test of incorporation would be irrelevant. In this particular case a test based on the centre of administration or the place where the principal activities are conducted would seem to be more appropriate.

(a) Where it is not questioned by either party that the juridical person initially had the nationality of the host State, the tribunal or commission may find it convenient to assume that the juridical person did have this nationality, though in principle the question is one which it can decide *proprio motu*. However, where the position is questioned by one of the parties, the tribunal or commission will certainly have to decide the issue. Since strictly the whole issue of nationality is very much at large in the context of the jurisdiction of the Centre, it may be argued that the tribunal or commission may apply one or more of the possible criteria. It should not necessarily give preference to the place of incorporation simply because this seems to be the most usual test of the nationality of corporations in the law of diplomatic protection. It should be noted, however, that in determining whether a juridical person has the nationality of the host State a 'control' test cannot be applied, since the formulation of Article 25 (2) (b) of the Convention implies this. It is apparent that it cannot be said with certainty, in the present state of the law, what test a tribunal or commission will apply in a given case. Nor can it be certain whether a tribunal or commission has to decide on one nationality where one of the competing possibilities is the nationality of the host State, so as to arrive at the conclusion that the operative nationality is that of the host State, or not that of the host State but that of another State, as the case may be; nor whether it would decide that the juridical person has several nationalities of which one, however, is certainly that of the host State.

(b) If the first question to be asked, namely, whether the juridical person has the nationality of the host State, is answered in the negative, then the next

<sup>1</sup> But see now the *Barcelona Traction Co. case*, *I.C.J. Reports*, 1970, p. 3 at p. 48.

<sup>2</sup> See also A. Broches, *loc. cit.* (above, p. 243 n. 2), at pp. 360 et seq.

question arises whether the juridical person has the nationality of another Contracting State. In answering this question the tribunal or commission will really be interested in distinguishing between Contracting States and non-Contracting States. The problem of the tests to be applied is virtually similar to that just dealt with, except that it is arguable that a 'control' test may be applied to decide between foreign nationalities. This could mean that though a juridical person is incorporated in a non-Contracting State and would *prima facie* have the nationality of a non-Contracting State, it may be found nevertheless that that juridical person has the nationality of a Contracting State because of control by shareholders having the nationality of a Contracting State. It is conceivable, of course, that the converse may also happen: namely, that where the juridical person is incorporated in a Contracting State and would therefore have the nationality of that State, it is found to have for the purposes of the Convention the nationality of a non-Contracting State because of foreign control. The question whether a juridical person can have more than one nationality for the purposes of the Convention will be discussed below. In the event, however, that a juridical person must always be regarded as having only one nationality for the purposes of the Convention, an adjudicating body might take the position that the latter nationality should be attributed according to that test of the several possible tests, including the 'control' test, which will operate *in favorem jurisdictionis*.

It is submitted that the application of the 'control' test, as between nationalities which do not include that of the host State, is not excluded by the wording of Article 25 (2) (b). The wording of Article 25 (2) (b) does exclude the 'control' test in determining whether the juridical person has the nationality of the host State. However, it is arguable that in so far as the test has not been excluded either explicitly or by necessary implication for the purpose of deciding questions of nationality as between non-host State nationalities and it does not create any internal conflicts or inconsistencies in the interpretation of Article 25 (2) (b) if the test were applied by a tribunal or commission for that purpose, the test may be so applied by a tribunal or commission. The position taken here is supported to some degree by the fact that in the *travaux préparatoires* there is no evidence that it was agreed that the 'control' test was irrelevant for this purpose, nor is there any evidence that such an understanding formed the basis for the whole of Article 25 (2) (b).

While it would seem now that in the general international law of diplomatic protection the 'control' test is irrelevant in certain circumstances to determine the nationality of a corporation,<sup>1</sup> it is sufficient for a tribunal or commission to be able to apply the 'control' test that it is or has been applied in determining nationality in certain areas of the law and is, therefore, a possible test of nationality. Then, the test may be applied as one available competing test which in any given situation may or may not be applied. The same reasoning would help to justify the position which is implied above that if a juridical person must have only one nationality, the 'control' test should be applied only *in favorem*

<sup>1</sup> See the *Barcelona Traction Co. case*, *I.C.J. Reports*, 1970, p. 3.



*jurisdictionis*. Then the test may be applied as one available competing test which in any given situation may or may not be applied.

It should have emerged from the above analysis that the question of nationality of juridical persons for the purpose of the Centre's jurisdiction can be dealt with by a tribunal or commission in extremely flexible terms and particularly because it is not bound by the law of diplomatic protection in this regard. The nationality of a juridical person under the Convention can be seen in the light of a broad definition which requires some adequate connection between the juridical person and a State. There may be more than one State in respect of which such connection could reasonably be established. The *travaux préparatoires* do not require a different approach. A second proposition that may be adhered to in the interpretation of the Convention is that every effort should be made to give the Centre jurisdiction by the application of the flexible approach, within the broad definition of nationality, and to the extent that possibilities are not explicitly excluded by the Convention itself. This does not mean that a tribunal or commission may indiscriminately hold that it has jurisdiction on the ground that a juridical person has the nationality of another Contracting State and does not initially have the nationality of the host State. In every case where it is held that there is jurisdiction on these grounds there would have to be a rational justification based on acceptable criteria.

(iv) *Multiple nationality*. If the position outlined above were to be accepted, the question would arise whether it could be held that a juridical person had more than one nationality for the purposes of the Centre's jurisdiction and what would be the consequences of that position.

If there is more than one criterion for determining nationality, it should theoretically be possible to apply several criteria at the same time, producing the result that a juridical person has more than one nationality.<sup>1</sup> Thus, if it were possible to predicate nationality on both the place of incorporation and the centre of administration, it might be possible to conclude that where a corporation is incorporated in State X but has its centre of administration in State Y, it has the nationalities of both State X and State Y. Consequently, it would be possible to hold in appropriate circumstances that a juridical person initially has the nationality of the host State and of State X, another Contracting State; or that it has the nationalities of State Y and State Z, both other Contracting States; or that it has the nationality of State A, another Contracting State, and State B, a non-Contracting State. It will be observed that, for the purposes of the Centre's jurisdiction, it is only necessary that the juridical person have the nationality of a Contracting State other than the host State; or, if it initially has the nationality of the host State, that it be agreed because of foreign control that it has the nationality of another Contracting State. It is not required that the juridical person have the nationality of *only* one other Contracting State or that it should not have the nationality of a non-Contracting State if it also has the nationality of another Contracting State. Thus, were the juridical

<sup>1</sup> On one aspect of dual nationality in this connection, see A. Broches, *loc. cit.* (above, p. 243 n. 2), at p. 359.

person held to have the nationalities of State Y and State Z, both Contracting States, or the nationality of State A, another Contracting State, and State B, a non-Contracting State, the multiple nationality would not prevent the assumption of jurisdiction by a tribunal or commission.<sup>1</sup> On the other hand, where one of the multiple nationalities is that of the host State, assumption of jurisdiction would be precluded, except in the case where there is an agreement predicated on foreign control that the juridical person has the nationality of another Contracting State.

In view of the impediment to jurisdiction where one of the multiple nationalities is initially that of the host State and there is no agreement on a nationality based on foreign control, it may be useful if a means can be found to avoid a finding of multiple nationality. Here it is possible for a tribunal or commission to follow the principle that a juridical person can have only one nationality (except, of course, where it has more than one nationality—i.e. that of the host State—because of agreement based on foreign control). A search can be made for the 'operative' or 'effective' nationality in terms of a broad definition of nationality. It is not necessary to establish a hierarchy within the applicable tests for this purpose. The relevant exercise would involve finding with which State the juridical person has the closest connection in all the circumstances of the case in terms of the applicable tests.<sup>2</sup>

In the case where there is a choice between the nationality of a Contracting State and that of a non-Contracting State, the selection of a single nationality may lead to the exclusion of the Centre's jurisdiction if it be found that the proper nationality is that of the non-Contracting State. In the case where the two competing nationalities are those of the host State and another Contracting State and there has been no agreement based on foreign control, the adoption of the principle of single nationality would result in the Centre's having jurisdiction if it is held that the proper nationality is that of the other Contracting State. Therefore, because (i) where an agreement has been made to invoke the Centre's jurisdiction, there should be a preference *in favorem jurisdictionis*, and (ii) there is no absolute or compelling logic requiring that a juridical person have only one nationality, and (iii) the cases where the nationality of the host State is involved should be regarded as special cases, because the express terms of the Convention give such cases special treatment, it is submitted that the principle that a juridical person should have a single and exclusive nationality is to be followed only where the nationality of the host State is one of the competing nationalities according to the applicable tests. Such a difference in treatment between the situation where the nationality of the host State is a competing nationality according to the applicable tests and those in which it is not does not really give rise to logical inconsistency, if the basic principle is that the Centre's jurisdiction should be established whenever reasonably possible.

<sup>1</sup> This is so, although problems may be created under other provisions of the Convention by the existence of multiple nationality: see, e.g., Articles 38 and 39.

<sup>2</sup> This would be one of the circumstances in which the test enunciated in the *Nottebohm* case would be relevant.

If, where there are several competing nationalities, not including the nationality of the host State, but including that of a non-Contracting State, a tribunal or commission holds that the juridical person has several nationalities including that of a Contracting State, and that consequently it has jurisdiction, the host State may, nevertheless, be faced with a claim based on diplomatic protection brought by the non-Contracting State, because the latter is not bound by Article 27 (1) of the Convention. This case is similar to that discussed above in connection with natural persons and the answer consequently is similar.

(v) *The effect of agreement.* What is the effect of an agreement between the host State and the juridical person on the nationality of the juridical person? Does it dispose of the question of nationality finally and prevent a tribunal or commission from examining the question of nationality?

Primarily, there are five categories of situation that might arise:

- (a) the possible nationalities in competition apart from the agreement are all of Contracting States other than the host State;
- (b) the possible nationalities in competition apart from the agreement include a nationality of a non-Contracting State, the others all being of Contracting States other than the host State;
- (c) the agreed nationality is that of a Contracting State, although the possible nationalities apart from the agreement are not those of Contracting States other than the host State;
- (d) the possible nationalities in competition apart from the agreement include that of the host State, the others not being based on foreign control;
- (e) the possible nationalities in competition apart from the agreement include that of the host State, the foreign nationalities being based on control.

In the case of situation (a), an agreement on one or more of the nationalities in competition would not affect the question of jurisdiction. Therefore, as far as that question is concerned, a tribunal or commission would have no difficulty in recognizing the agreement on nationality for the purposes of jurisdiction.

In situation (b), the nationality or nationalities of one or more Contracting States may be chosen to the exclusion of that of the non-Contracting State. Here also it does not affect the question of jurisdiction that the juridical person has in fact more than one nationality including the nationality of a non-Contracting State. It has already been submitted that a tribunal or commission has good reason to take the position that, where the nationality of the host State is not involved at any rate, there is no need to make a choice of nationalities so that the person is left with only one nationality. In view of this, the existence of a competing nationality of a non-Contracting State should not present difficulties to a tribunal or commission and induce it to question an agreement on a nationality or nationalities of one or more Contracting States. As has been said:

When a Commission or Tribunal is faced with a challenge to the validity of an agreement, voluntarily entered into by a government with a company which is not incorporated in any Contracting State, the Commission or Tribunal should sustain



that challenge only if not to do so would permit parties to use the Convention for purposes for which it was clearly not intended.<sup>1</sup>

In case (c), the nationality of the Contracting State which is agreed upon has no relevance to the realities of the situation. The agreement amounts to an unreasonable selection of nationality. It is submitted that a tribunal or commission would be acting within its competence to disregard such an agreement, as being contrary to the Convention. This is clearly a case where the Convention would be used for purposes for which it was not intended.

In situation (d), the question may be raised whether a tribunal or commission would examine the reality of the nationality of the juridical person, if the nationality of a Contracting State other than the host State were agreed upon. Thus, a juridical person may be incorporated in the host State but have its centre of control and administration in another Contracting State, while not being 'controlled' by foreign interests. In the unlikely event that this situation arises and the parties agree that the nationality of the juridical person is that of the Contracting State other than the host State, it is submitted that a tribunal or commission is not compelled to investigate whether this is the 'genuine' or 'effective' nationality of the juridical person. In the face of agreement between the parties it suffices that a possible nationality is chosen and there is no compelling need to accept the argument that the juridical person must have only one nationality which must be the 'effective' one where one of the competing nationalities is that of the host State and where there is no agreement based on foreign control. On the other hand, it is clear that a tribunal or commission would not be precluded from examining the issue whether the chosen nationality is a possible nationality under any of the available tests. That is to say, if it finds that the nationality chosen has in fact absolutely no connection with the juridical person, it may disregard the agreement in this extreme case. For example, if a juridical person is incorporated in the host State, has a mixed shareholding with a minority of shareholders of the nationality of a non-Contracting State and a majority of shareholders of the nationality of the host State, its centre of administration and control is in a non-Contracting State, and it is agreed between the parties that it has the nationality of State X, a Contracting State, with which it has no connection, then a tribunal or commission might be justified in disregarding the agreement on nationality. But, as will be appreciated, this can only happen in a very extreme situation which is really unlikely to arise in practice.

The reason for the position advocated is that the agreement of the parties should be given effect to wherever possible on matters connected with the Centre's jurisdiction unless it is totally unreasonable, even if in the absence of agreement the tribunal or commission might not have come to the same conclusion on nationality as is incorporated in the agreement. This approach is justified by the basically consensual nature of jurisdiction under the Convention. As has been said:

The parties should be given the widest possible latitude to agree on the meaning of

<sup>1</sup> A. Broches, *loc. cit.* (above, p. 243 n. 2), at p. 361.

'nationality' and any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion should be accepted.<sup>1</sup>

The validity of this position is further supported by the fact that there is no single criterion agreed upon in practice for determining the nationality of a juridical person and, therefore, the determination of nationality for a juridical person may often be a very difficult operation.

In situation (e) for similar reasons to those given in regard to situation (d), a tribunal or commission is not likely to upset a choice of nationality by agreement which is based on a reasonably possible criterion. In this case, though, there is the added factor that agreement between the parties on a nationality based on foreign control is expressly provided for in the Convention. Of course, much would depend on how foreign control were viewed. The contents of this concept will be discussed below.<sup>2</sup> To illustrate the general point made above, if several foreign nationalities are in control of a corporation and one of these which happens to be that of a Contracting State is chosen as the foreign nationality to be agreed upon, although another nationality of a non-Contracting State by itself or the nationality of the host State by itself has greater control than the nationality of the other Contracting State, a tribunal or commission will have good reason for not rejecting the choice of the parties because the nationality of the Contracting State has an adequate element of control. On the other hand, where the foreign control lies clearly in the hands of a nationality of a non-Contracting State, and it is agreed that the corporation has the nationality of a Contracting State because of foreign control, such an agreement would, it is submitted, not be respected by a tribunal or commission, because if it were respected it would permit the parties to use the Convention for purposes for which it was clearly not intended.

It should also be noted that in the case where the juridical person initially has the nationality of the host State and it is agreed that because of foreign control it has the nationality of a Contracting State other than the host State, such agreement must be explicit. An argument that there was an implied agreement on such nationality could not be entertained by a tribunal or commission, because Article 25 (2) (b) in its present formulation can only mean that such agreement must be explicit. It also seems to have been assumed in the discussions leading to the formulation of the Convention that this was the case.

(vi) *The concept of 'control'*. It has been said that (a) the notion of control could be used as a basis for an explicit agreement between the parties to a dispute that the juridical person has the nationality or nationalities of one or more Contracting States other than the host State, where it initially has the nationality of the host State, or (b) it could be relevant in assisting a finding that a juridical person has the nationality of a Contracting State other than the host State where there are competing nationalities including those of non-Contracting States (provided it is not used against the nationality of the host State as

<sup>1</sup> A. Broches, loc. cit. (above, p. 243 n. 2), at p. 361.

<sup>2</sup> See below, pp. 264 et seq.

a competing nationality). An important question is how this concept of 'control' is to be interpreted in each case.

In relation to (a) when the question was discussed at the consultative meetings of legal experts it was pointed out that the concept of 'control' had numerous difficulties inherent in its application.<sup>1</sup> It was particularly noted that difficulties might arise in establishing 'control' where a corporation had bearer shares<sup>2</sup> and that problems might be created by the existence of holding companies, nominees, voting arrangements, trusts and various forms of disguised ownership.<sup>3</sup> In the Legal Committee the view was taken that it should be left to each arbitral tribunal to decide the question of control.<sup>4</sup> It was also suggested that the matter should be left to the decision of the host State entering into the submission agreement.<sup>5</sup> No precise definition of 'control' emerged from the discussions.

It is submitted that in view of the absence of any guidance in the *travaux préparatoires* and in the light of the theory behind the jurisdiction of the Centre, the following points emerge in relation to the question of foreign control connected with (a) above.

First, in view of the fact that the agreement of the parties is at the heart of the Centre's jurisdiction, agreement between the parties on a foreign nationality based on foreign control would raise a strong presumption that there was adequate foreign control on which to predicate a foreign nationality.

Secondly, for the same reason it is only in the case where such foreign control cannot be postulated on the facts on the basis of the application of any reasonable criterion that a tribunal or commission would not recognize an agreement on foreign nationality based on foreign control, because in such a case the parties would purport to use the Convention for purposes for which it was not intended.

Thirdly, there is no reason to suppose that in deciding the question whether a reasonable criterion forms the basis for an agreement on foreign control, a tribunal or commission will necessarily be bound by a single definition based on a majority shareholding or any other particular test. In the case of diplomatic protection, as understood by some authorities before the *Barcelona Traction* case,<sup>6</sup> the concept of 'control' appears to have been associated entirely with the nature of the shareholding.<sup>7</sup> In the case of the Centre's jurisdiction there is no requirement that similar limitations be observed. On the contrary, a tribunal or commission may regard any criterion based on management, voting rights, shareholding or any other reasonable theory as being reasonable for the purpose. The point is that the concept of 'control' is broad and flexible, particu-

<sup>1</sup> *History*, vol. 2, pp. 359, 396, 447, 581.

<sup>2</sup> *Ibid.*, vol. 2, p. 361.

<sup>4</sup> *Ibid.*, vol. 2, p. 875.

<sup>3</sup> *Ibid.*, vol. 2, p. 447.

<sup>5</sup> *Ibid.*, vol. 2, p. 870.

<sup>6</sup> *I.C.J. Reports*, 1970, p. 3. It was stated in this case that the 'control' test was inapplicable to protect shareholders of a corporation and that the nationality of a corporation established by other means could only be disregarded in exceptional circumstances: *ibid.* at pp. 33 et seq. and 40.

<sup>7</sup> See L. Caflisch, *La Protection de sociétés commerciales et des intérêts indirects en droit international public* (1969), pp. 89 et seq.; J. M. Jones, 'Claims on behalf of Nationals who are Shareholders in Foreign Companies', this *Year Book*, 26 (1949), p. 225.



larly because much should be left to the autonomy of the parties. It is submitted, however, that the question is not whether the nationality with the most control according to a reasonable criterion has been agreed upon, but whether the nationality chosen represents an exercise of a reasonable amount of control to warrant its choice on the basis of a reasonable criterion. Thus, where nationals of a Contracting State hold 35 per cent of the shares of a corporation and nationals of a non-Contracting State hold 55 per cent of the shares, an agreement that the corporation has the nationality of the Contracting State may well be upheld by a tribunal or commission as being based on a reasonable amount of control. Such a decision could be supported particularly if, for instance, a judicial action is available for the protection of minority shareholders.

In relation to (b), there is little or no guidance afforded in the *travaux préparatoires*. In this case, too, however, it is submitted that a tribunal or commission will be guided by reasonable criteria similar to those relevant to (a). Where a tribunal or commission uses the criterion of control to establish foreign nationality in the absence of agreement, it could give such concept a flexible content without limiting itself to any single criterion. The approach should incline towards interpreting the concept of 'control' always *in favorem jurisdictionis*, since the parties have already agreed to invoke the jurisdiction of the Centre. Thus, where it is argued, in spite of such agreement, that the private party being a juridical person does not have the nationality of a Contracting State other than the host State, it would not be inappropriate for an adjudicating body to find in the proper circumstances that the juridical person does have such nationality, even though it is not incorporated in, nor has its place of administration in, nor has any other such connection with a Contracting State, on the basis of some element of control exercised by nationals of a Contracting State other than the host State, such control being established not necessarily by reference to a majority shareholding but possibly by the application of some less exacting criterion. In the event that it is possible by the application of one or more of the several criteria to attribute control to more than one nationality, including the nationalities of non-Contracting States, an adjudicating body could well avoid making a choice between nationalities, and conclude that there is control by the nationals of a Contracting State, even though there may be an element of control vested in nationals of non-Contracting States. It is only when it is quite clear that it cannot be said that nationals of a Contracting State have adequate control over the entity that an adjudicating body should hold that it does not have the nationality of a Contracting State. Thus, if shares are held, 36 per cent by the nationals of State A, a Contracting State other than the host State, 34 per cent by nationals of a non-Contracting State and 30 per cent by nationals of another non-Contracting State, and if the management is vested mainly in nationals of State A, a tribunal or commission could well hold that there is 'control' exercised by the nationals of the Contracting State, without investigating the difficult question of whether the nationals of a Contracting State have more control than the nationals of non-Contracting States. On the same lines, if control can only be established by reference to a combination of

two or more nationalities, if this combination consists of the nationalities of Contracting States other than the host State, although control cannot reasonably be attributed to nationals of a single Contracting State, it would be possible to hold that the juridical person has the nationality of Contracting States other than the host State. Thus, where nationals of a non-Contracting State have 40 per cent of the shares in a corporation and nationals of States A and B, both Contracting States other than the host State, have each 30 per cent of the shares, the management being vested in nationals of both States A and B, a tribunal or commission may well hold that the corporation has the nationalities of Contracting States for the purposes of the Convention, because control is vested in the nationals of two Contracting States.

In connection with (b), where there is an agreement between the parties that the juridical person has the nationality or nationalities of one or more Contracting States other than the host State and such agreement is evidently based on control, a tribunal or commission is not bound to establish whether in its opinion the juridical person has a required nationality. It would be adequate if such agreement were based on any reasonable criterion or criteria of control. As in the case of (a), it is a question of whether it can be said that the nationality or nationalities agreed upon have an adequate amount of control over the juridical person, such control being based on any of the applicable criteria. It is also submitted that a tribunal or commission should be less strict in passing judgment on control for the purposes of an express agreement based on control than in cases where it must decide on nationality in the absence of an agreement on nationality.

(vii) *The relevant time.* In the preliminary draft of the Convention the relevant time at which the nationality requirements of juridical persons had to be satisfied was the time at which the parties consented to the jurisdiction of the Centre. During the consultative meetings and in the Legal Committee many alternative suggestions were made covering both natural and juridical persons. It was suggested that the nationality should be retained throughout the proceedings,<sup>1</sup> that the time of the investment was the relevant time,<sup>2</sup> that both the time of consent and the time of investment were relevant,<sup>3</sup> that the time of consent and the time of the application to institute proceedings should be considered,<sup>4</sup> and that the nationality requirement should be satisfied at the time of consent and at the time of the award.<sup>5</sup> However, the final version of the Convention contains the requirement that the nationality requirement in the case of juridical persons should be satisfied only at the time at which the parties consented to the jurisdiction of the Centre. The present formulation of the Convention implies that the relevant time is that at which the consent to jurisdiction is effective for both parties. It also means that should the nationality of a juridical person change for some reason after that date so that it loses the nationality that it should have, namely, that of another Contracting State than the host State, this would be immaterial for the purposes of the Centre's jurisdiction. Thus,

<sup>1</sup> *History*, vol. 2, p. 395.

<sup>3</sup> *Ibid.*, vol. 2, p. 708.

<sup>4</sup> *Ibid.*, vol. 2, p. 445.

<sup>2</sup> *Ibid.*, vol. 2, p. 398.

<sup>5</sup> *Ibid.*, vol. 2, p. 538.

for instance, in the case of a nationality validly based on 'control' at the time of the agreement to submit to the jurisdiction of the Centre, whether there is an agreement on nationality or not, if the exercise of control changes so that it cannot be said that at a later date, e.g., at the time of the proceedings, the control is vested in nationals of a Contracting State other than the host State, this would not affect the Centre's jurisdiction. Thus, for example, if at the time of the agreement to submit to the jurisdiction of the Centre, nationals of State A, a Contracting State other than the host State, hold 55 per cent of the shares and have control over a corporation, but by the time proceedings are instituted all these shares are sold to nationals of a non-Contracting State or even of the host State, so that control passes to such nationals, the Centre would still have jurisdiction.

#### D. CONCLUSION

The scope of the jurisdiction *ratione personae* of the Centre under the Convention raises some interesting questions of interpretation. The approach suggested in this article to the problems of interpretation would result in giving that jurisdiction a reasonably wide extension. Since submission to the jurisdiction of the Centre is based on consent, where there is such consent between the parties, there is every reason that the effect of such consent should not be frustrated except only in the limited situations where, if such consent were given effect to, the result would be that the Convention would be used for purposes for which it was clearly not intended. A broad and constructive view may be taken of the objects of the Convention for this purpose and particular emphasis may be placed on the underlying basis of consent.

One special result of the above approach is that the parties are permitted to agree to a large extent on the meaning of many of the concepts used in the Convention on which jurisdiction *ratione personae* is based, and it is only where such agreement clearly reveals an abuse of the Convention's purpose that it will be disregarded. Even where there is no agreement on the meaning of inadequately defined concepts, or where to recognize the possibility of such an agreement would be inappropriate, their limits could be defined in broad and flexible terms, often with a result *in favorem jurisdictionis* and without doing damage to the objects of the Convention.





## CHARLES HENRY ALEXANDROWICZ

1902–1975

IN Charles Alexandrowicz, who died on 26 September 1975, international lawyers have lost a colleague of very wide experience and great originality of mind. He was born on 13 October 1902 as the son of an Austro-Hungarian general who became a general in the Polish army after 1918. He was educated at the Scottish College (Schottengymnasium) in Vienna. This, one of the best-known Austrian grammar schools, is run by Benedictine monks whose predecessors had come from Scotland; it still conveys to its pupils something of the spirit of the monastic schools of an earlier age. Alexandrowicz studied law at the University of Cracow; his chief interest at that time was in the field of canon law, but he had also by then developed his life-long interest in history which was to inform, in years to come, his most important contribution to international law. Both interests may have owed something to impressions received at school. He was in practice as a lawyer in Cracow before the Second World War. In the course of the War, he came to London where he was successively Chairman of the London Board of the National Economic Bank of Poland and, until 1948, Chairman of the European Central Inland Transport Organization.

In the meantime he had been called to the Bar by Lincoln's Inn; for several years he practised at the Bar and lectured at the University of London. During the early post-war years, he felt increasingly attracted to academic work in international law. The first area in which he specialized was the law of international organizations of which he had considerable practical experience. It remained one of his abiding interests, and, in addition to a number of articles which it is not proposed to list in this note, he published four books on it: *International Economic Organisations*, 1952; *World Economic Agencies*, 1962; *The Law of Global Communications*, 1971; *The Law-making Functions of the Specialised Agencies of the U.N.*, 1973. His work in the field of international organizations by itself amounts to a very distinguished contribution to international law, but it was not his most important work.

In 1951 Alexandrowicz was appointed Professor of International and Constitutional Law at the University of Madras, where he remained for ten years. During that time he was also Honorary Legal Adviser to the Government of India, in particular to the Prime Minister, Pandit Jawaharlal Nehru. He edited a bibliography of Indian law, and was actively concerned with Indian constitutional law, as is shown by the publication, in 1957, of his book *Constitutional Developments in India*. The great importance of those ten years consisted in this, however, that his work in India brought him face to face with the Indian archives, while he was concerned with contemporary constitutional and above all international problems of South and South East Asia. It was his most important and indeed unique contribution to international law that he realized

the significance of the source material thus placed at his disposal, and also its implications for international law, in particular the history of international law. In consequence, he did three things: he explored the history of international law in Asia and, later, Africa himself, and organized research by others; secondly, he established the *Indian Yearbook of International Affairs* which served, and still serves, as a means of publishing, *inter alia*, the results of research in this field, and thirdly he founded the Grotian Society the purpose of which is the study of the history of international law and which, as Chairman and Director of Studies, he ran so long as he was alive. The Society has so far published three collections of papers, two as independent publications and one as a section of a volume of the *Indian Yearbook of International Affairs*. A fourth collection is now in the press and will again be published as part of the *Indian Yearbook*.

Alexandrowicz continued to work in the field of international law and its history in Asia and Africa to the end of his life. He travelled frequently in order to work in libraries and archives of many countries where relevant material could be found. Again, it is not proposed to list his articles, many of which are of great importance, but his major contributions must be mentioned: *Treaty and Diplomatic Relations between European and South Asian Powers in the Seventeenth and Eighteenth Centuries* (Hague Academy lectures), 1961; *History of the Law of Nations in the East Indies*, 1967; *The Afro-Asian World and the Law of Nations* (Hague Academy lectures), 1969; *The European-African Confrontation*, 1973.

The opinion that international law was a purely European body of law to which non-European nations were not admitted until the nineteenth century at the earliest was, in his view, an aberration of nineteenth-century theory connected with the rise of positivism. He maintained that the classical writers from the sixteenth to the eighteenth centuries who wrote in the natural law tradition had not held such a narrow view, but that they had, on the contrary, conceived international law to be essentially global, and further that there had been a body of international law in South East Asia which had influenced European international law when the European powers came into contact with it. He always stressed the importance of the history of international law and drew attention to its implications for contemporary problems. It is worth noting that he made detailed studies of two works which had been unknown to, or ignored by, scholars, viz. *De justo imperio Lusitanorum asiatico* by Seraphim de Freitas, a Portuguese opponent of Grotius, and the *Arthashastra* by Kautilya, an Indian writer of the fourth century B.C.

Alexandrowicz left India in 1961 to become Associate Professor of International Organization at the University of Sydney. He retired in 1967 and returned to live permanently in England. He was a Fellow of the British Institute of International and Comparative Law from 1968 to 1969 and a Visiting Fellow of the Centre of International Studies of the University of Cambridge from 1969 to the time of his death. It is perhaps significant that the Centre of International Studies is maintained jointly by the Faculties of Law and History.

It has been indicated above that Charles Alexandrowicz lectured twice at the



Hague Academy of International Law (1960 and 1968); he also held Visiting Professorships at the Sorbonne in 1963, at the Institut des Hautes Études Internationales, Paris, in 1969, at the College of Wooster, Ohio (the Gillespie Visiting Professorship) in 1969-70, and at the École Pratique des Hautes Études, Sorbonne, in 1970-1; he was also in demand as a lecturer elsewhere, e.g. in 1972 and 1973 he lectured at the University of Cologne, and to the end of his life he lectured for the University of London. He was awarded the Grotius Memorial Medal in 1961, and the LL.D. by the University of Sydney in 1969.

Charles Alexandrowicz was a man of very great charm and of wide interests outside his professional work. These included music, literature and mountaineering. He had many friends whose sympathy goes out to his widow, who was also his collaborator.

W. A. STEINER



## NOTES

### THE HIERARCHY OF THE SOURCES OF INTERNATIONAL LAW\*

By MICHAEL AKEHURST<sup>1</sup>

Every legal system has evolved techniques for resolving conflicts between different legal rules. These techniques fall into three main categories.

The first technique is to make rules derived from one source prevail over rules derived from another source; *lex superior derogat inferiori*.

The second technique is to make later rules prevail over earlier rules; *lex posterior derogat priori*. However, this technique cannot be applied where the later rule derives from a lower source than the earlier rule, unless the authority which created the earlier rule provided for the possibility of its being repealed or overridden by a later rule derived from a lower source (as when an Act of Parliament gives a Minister power to repeal parts of the Act by delegated legislation).

The third technique is to make a particular rule prevail over a general rule; *lex specialis derogat generali*. ('Particular' and 'general' are relative, not absolute terms; one rule may be more general than a second rule and less general than a third rule.) But *lex specialis derogat generali* is no more than a rule of interpretation. In other words, there is a presumption that the authority laying down a general rule intended to leave room for the application of more specific rules which already existed or which might be created in the future, even though the specific rules might be derived from an inferior source; but this is only a presumption, which can be rebutted by proof of contrary intention.

All three techniques are applicable to international law, but the way in which they are applied is slightly different. First, the hierarchy of sources is not as well established in international law as it is in most municipal systems. Second, the maxim *lex posterior derogat priori* is sometimes difficult to apply in international law because customary law and general principles of law come into being gradually, so that no precise date can be assigned to their creation. Third, the maxim *lex specialis derogat generali* assumes greater importance in international law, not only because of the occasional difficulties of applying the other two maxims, but also because of the virtual absence of legislation in international law. Multilateral treaties co-exist with bilateral treaties, general custom co-exists with regional and other forms of special custom, and so on. One rule of international law may be more general than another, either because it has a broader subject-matter, or because it binds a larger number of States;<sup>2</sup> the maxim *lex specialis derogat generali* can therefore take two different forms in international law.<sup>3</sup>

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<sup>2</sup> A conflict between a rule binding a small group of States and a rule binding a larger group arises only in so far as membership of the two groups overlaps. If there is no overlap, there is no conflict; a State is not bound by a rule which exists among a group of States of which it is not a member.

<sup>3</sup> The application of the maxim can be seen in the fact that special custom prevails over general



### *Article 38 of the Statute of the International Court*

The Committee of Jurists which drafted the Statute of the Court in 1920 included in their draft a provision that the items listed in the first paragraph of Article 38 should be applied *en ordre successif*. However, it is not clear whether these words were intended to establish a definite hierarchy of sources, or whether (as Phillimore argued) they merely reflected the logical sequence in which the rules would occur to the judge's mind. The words *en ordre successif* were deleted by the Sub-Commission of the Third Committee of the First Assembly of the League of Nations, but it is not clear whether the deletion was inspired by a feeling that the idea contained in the words was wrong, or that the idea was so obviously right as not to need stating.

Some authorities have argued that Article 38 lays down a hierarchy of sources.<sup>1</sup> Others disagree.<sup>2</sup>

It is sometimes argued that the order in which the various items are listed in Article 38 reflects the maxim *lex specialis derogat generali*—customary rules are more general than treaties, and general principles of law are more general than custom.<sup>3</sup> That is often so, but not always, as we shall see.<sup>4</sup> There is probably more truth in Le Fur's observations that treaties are easier to prove than custom and custom is easier to prove than general principles of law; that is one reason why they are likely to be applied in that order, and perhaps why Article 38 lists them in that order.<sup>5</sup>

The problem of the hierarchy of the sources of international law has seldom given rise to difficulties in practice.<sup>6</sup> However, there is no guarantee that that state of affairs will continue; for that reason, and also because of the light which it sheds on the general theory of international law, the topic merits further discussion.

### *Treaties and custom*

The Permanent Court of International Justice in several cases applied treaties which conflicted with customary rules.<sup>7</sup> However, this does not mean that treaties invariably custom *inter partes* (see the discussion of special custom in the author's article on custom, above, p. 29).

However, international tribunals (with the exception of the Court of Justice of the European Communities) have tended to apply general principles of law common to nations in general and not general principles of law common to the parties. See *International and Comparative Law Quarterly*, 25 (1976), pp. 801, 821–5.

If there is a discrepancy between this tendency and the willingness of international tribunals to allow special custom to override general custom, it can be explained by recalling that *lex specialis derogat generali* is a maxim of interpretation, i.e. a means of giving effect to the presumed intention of the law-giver. Thus it applies to treaties and custom, because the creation of treaties and (to some extent) of custom is an intentional activity, but not to general principles of law, which are not intentionally created as a source of international law but are simply the by-product of similarities between municipal laws (it is hardly to be supposed that a State would enact a rule in its own law with the intention of fostering the growth of a general principle of law which would be advantageous to that State on the international plane).

<sup>1</sup> Fedozzi's argument in the *Lotus* case, reprinted in Marek, *Répertoire des décisions et des documents . . . de la P.C.I.J. et de la C.I.J.*, series 1, vol. 2 (1967), p. 874; *Right of Passage* case, I.C.J. Reports, 1960, pp. 6, 90, per Judge Moreno Quintana dissenting.

<sup>2</sup> *United Nations Conference on International Organization* (1945), vol. 13, p. 164; British argument in the *Corfu Channel* case, I.C.J. Reports, 1949, pp. 4, 99; *United Nations Conference on the Law of Treaties, Official Records*, First Session, p. 198, para. 5; *ibid.*, Second Session, p. 67, para. 9.

<sup>3</sup> Castañeda, *Legal Effects of United Nations Resolutions* (1969), p. 227.

<sup>4</sup> See below, pp. 275 and 279.

<sup>5</sup> *Recueil des cours*, 54 (1935), pp. 5, 212.

<sup>6</sup> Some explanations for this state of affairs are suggested in Akehurst, *A Modern Introduction to International Law*, second edition (1971), p. 58.

<sup>7</sup> *Acquisition of Polish Nationality* (1923), P.C.I.J., Series B, No. 7, p. 16; *Treatment of Polish*

prevail over custom; the treaties in the cases in question were probably simply more specific, or later in time, than the conflicting customary rules.

It is sometimes said that treaties prevail over custom by virtue of the maxim *lex specialis derogat generali*.<sup>1</sup> It often happens that the subject-matter of a treaty is more specific than a customary rule, or that the States bound by a treaty are fewer than the States bound by a customary rule. But it is equally possible that a customary rule may be more specific than a treaty, or that a special custom binding a small number of States may conflict with a multilateral treaty binding a large number of States; in such cases the maxim *lex specialis derogat generali* causes the customary rule to prevail over the treaty.<sup>2</sup>

Where the maxim *lex specialis derogat generali* provides no clear guidance, or where it is shown not to reflect the intentions of the States concerned, it seems that treaties and custom are of equal authority.<sup>3</sup> The later in time prevails.<sup>4</sup> A treaty can override pre-existing custom, but subsequent custom can override a treaty. This view comes naturally to writers who regard custom as an implied agreement between States,<sup>5</sup> but it is also shared by many writers of other schools.<sup>6</sup> Termination of a treaty as a result of the subsequent growth of a conflicting custom is an example of desuetude, a well-recognized method by which treaties can come to an end.<sup>7</sup>

However, just as there is a presumption against the establishment of new customary rules which conflict with pre-existing customary rules,<sup>8</sup> so there is a presumption against the replacement of customary rules by treaties and vice versa. There is a presumption of interpretation (rebuttable, like all presumptions of interpretation) that treaties are not intended to derogate from customary law, just as statutes in English law are

*Nationals* (1932), *P.C.I.J.*, Series A/B, No. 44, pp. 23-4; *Lighthouses* case (1934), *ibid.*, No. 62, p. 25; *Eastern Greenland* case (1933), *ibid.*, No. 53, p. 76, *per* Judge Anzilotti dissenting. See also the *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, pp. 3, 24.

<sup>1</sup> *P.C.I.J.*, *Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee*, 1920, p. 337 (Ricci-Busati). And see above, p. 274 n. 3.

<sup>2</sup> Le Fur, *Recueil des cours*, 54 (1935), pp. 5, 209.

<sup>3</sup> Despite occasional statements that treaties have a higher hierarchical authority than custom; see above, p. 274 n. 1 (but cf. n. 2).

<sup>4</sup> With the possible exception of cases where it can be proved that the parties intended otherwise; cf. Article 30 (2) of the Vienna Convention on the Law of Treaties.

<sup>5</sup> According to such writers, the only difference between treaty and custom is one of form; a treaty is an express agreement and custom is an implied agreement. Since treaty and custom are two different forms of the same thing, they are equal to one another in authority; a subsequent treaty overrides an earlier custom, and a subsequent custom overrides an earlier treaty, just as a subsequent treaty overrides an earlier treaty. See Strupp, *Recueil des cours*, 47 (1930), p. 330; Tunkin, *Theory of International Law* (1974), p. 142.

<sup>6</sup> Heilborn, *Recueil des cours*, 11 (1926), pp. 5, 29; Castberg, *ibid.*, 47 (1933), pp. 313, 338; Reuter, *ibid.*, 103 (1961), pp. 426, 484; Monaco, *ibid.*, 125 (1968), pp. 93, 213-14; Capotorti, *ibid.*, 134 (1971), pp. 427, 516; Paul de Visscher, *ibid.*, 136 (1972), pp. 1, 79; Koster, 'Les fondements du droit des gens', *Bibliotheca Visseriana*, 4 (1925), p. 249; Sereni, *Diritto internazionale*, vol. 1 (1956), p. 143; Verzijl, *International Law in Historical Perspective*, vol. 1 (1968), p. 85. See also the writers cited by Tunkin, *op. cit.* (previous note), p. 142.

<sup>7</sup> McNair, *The Law of Treaties* (1961), pp. 508, 516-18; Pinto, *Recueil des cours*, 87 (1955), pp. 391, 431-3; International Law Commission's 1966 report, *American Journal of International Law*, 61 (1967), p. 388 (identifying desuetude with implied consent). The addition at the Vienna Conference of the words 'after consultation with the other contracting States' to what is now Article 54 (b) of the Vienna Convention on the Law of Treaties was apparently not intended to prevent the operation of desuetude: *United Nations Conference on the Law of Treaties, Official Records*, First Session, p. 476.

<sup>8</sup> See the author's article on custom, above, p. 1 at p. 19.



presumed not to derogate from the common law. Similarly, subsequent custom can terminate a treaty only when there is clear evidence that that is what the parties intend. In particular, if the treaty provides for denunciation and if the parties believe that a new customary rule conflicts with the treaty, one would expect them to denounce the treaty; failure to denounce strengthens the presumption that the treaty has not been replaced by a subsequent conflicting customary rule.<sup>1</sup>

The clearest evidence that the treaty has been replaced by a subsequent conflicting customary rule is to be found in statements (unilateral or otherwise) by the parties recognizing that this has occurred. If all the parties to the treaty make such statements, that is conclusive; but statements by only some of the parties are strongly persuasive (especially if a high proportion of the parties make such statements), provided that the other parties do not object.<sup>2</sup>

The Committee of Jurists investigating the Aaland Islands dispute said that violation by a party of its obligations under a treaty, coupled with acquiescence by the other parties, could not terminate the treaty.<sup>3</sup> Although this view seems excessively strict, there is a need for evidence that the parties believed that the treaty had terminated<sup>4</sup> or intended that their acts should terminate it. In the absence of express statements concerning termination, such evidence can only be provided by abundant and consistent practice. It is sometimes suggested that the widespread violations of some of the laws of war during both world wars have given rise to new customary rules which have terminated the relevant treaties, but it is doubtful whether the practice was sufficiently consistent to have that effect.<sup>5</sup>

Where the treaty permits but does not require a State to act in a particular way, it is dangerous to infer desuetude from failure to act in that way.<sup>6</sup>

In all cases, what counts is the practice followed *inter se* by the parties to the treaty; the practice which they follow in their dealings with States which are not parties to the treaty, and the practice of the latter States, may give rise to a rule of customary law, but such a rule has no effect on the treaty unless it is followed by the parties to the treaty in their relations with one another.<sup>7</sup>

Just as a new customary rule can terminate a treaty, it can also amend a treaty.<sup>8</sup>

<sup>1</sup> Cf. *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, pp. 3, 25: '... when a number of States ... have drawn up a convention specifically providing for a particular method by which the intention to become bound by ... the Convention is to be manifested ... , it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way.'

<sup>2</sup> Cf. the Reichsgericht's decision in *S.E. v. G. and Gen.* (1925) (English translation in Briggs, *The Law of Nations*, second edition (1952), p. 902).

<sup>3</sup> *League of Nations, Official Journal*, Special Supplement No. 3 (1920), p. 16.

<sup>4</sup> *Yuille, Shortridge* case (1861), de La Pradelle and Politis, *Recueil des arbitrages internationaux*, vol. 2, second edition (1957), pp. 78, 108.

<sup>5</sup> For instance, some of the violations provoked protests, and there has been a partial revival of respect for the old treaties since 1945: Akehurst, *A Modern Introduction to International Law*, second edition (1971), pp. 329-30. Moreover some of the violations during both world wars were justified as reprisals, which clearly negates the existence of a belief on the part of the belligerents that the treaties were no longer in force. See also below, p. 277, at n. 6.

<sup>6</sup> Schwarzenberger, *International Law*, vol. 1, third edition (1957), pp. 536-7.

<sup>7</sup> See also Thirlway, *International Customary Law and Codification* (1972), p. 132.

<sup>8</sup> A special (e.g. regional) custom followed by only some of the parties to the treaty can amend the Treaty as between those parties, although it does not affect their relations with the other parties: Thirlway, *International Customary Law and Codification* (1972), p. 139. Such a custom can presumably suspend the operation of the treaty as between the States bound by the custom (cf. Article 58 of the Vienna Convention on the Law of Treaties).



This is what happened in the *Air Transport Services Agreement Arbitration* of 1963.<sup>1</sup>

Article 38 of the International Law Commission's 1966 Draft Articles on the Law of Treaties provided:

A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.

This provision was deleted at the Vienna Conference by 53 votes to 15, with 26 abstentions.<sup>2</sup> However, only 10 of the 26 States which spoke in favour of the proposal to delete said that Article 38 was not in accordance with existing law; 3 States supported deletion because they thought that it was inappropriate for the Convention to deal with relations between treaties and customary law; 11 States said that the rule laid down in Article 38 was undesirable, but did not say whether or not it was in accordance with existing law; the remaining 2 of the 26 States advocated deletion without giving reasons. It is thus difficult to interpret the deletion of Article 38 as a clear rejection of the view that existing law allowed a treaty to be amended by subsequent practice, especially since the Vienna Convention did not exclude the possibility of termination of treaties by desuetude,<sup>3</sup> and expressly allowed a treaty to be interpreted in the light of subsequent practice (Article 3 (3) (b)); amendment merges into termination at one extreme and into interpretation at the other extreme. Of course, even if the deletion of Article 38 represented, as it probably did, progressive (or retrogressive) development rather than codification, it is possible that customary law will in the future reject the idea that a treaty can be amended by subsequent practice; but it is equally possible that customary law will not reject that idea, and that even the Vienna Convention on the Law of Treaties will be amended by subsequent practice.

The opposition to Article 38 at the Vienna Conference was largely inspired by criticism of the *Air Transport Services Agreement Arbitration*,<sup>4</sup> and by resulting fears that treaties which had been ratified by a State's legislature could be modified by the acts of low-ranking officials. These fears are not entirely unfounded (customary rules *can* be created by the practice of low-ranking officials), but they are somewhat exaggerated—the presumption against changing legal rules<sup>5</sup> means that treaties can be amended only by prolonged practice, and the need for prolonged practice gives higher authorities in the State concerned the opportunity to discover and stop the activities of low-ranking officials before it is too late. Moreover, as Tunkin rightly observes:

... only such practice as shows an agreement of the parties may introduce a change in a treaty ... Individual digressions from treaty provisions, ... [which] have taken place with the common consent of the parties, but [which] do not testify to their intention to change a treaty provision, do not modify the treaty.<sup>6</sup>

Subsequent practice often modifies the constituent treaties of international organizations.<sup>7</sup> Some authorities maintain that such modifications need the consent of all

<sup>1</sup> I.L.R. 38, pp. 182, 249 et seq. See also the *Préah Vihéar Temple* case, *I.C.J. Reports*, 1962, pp. 6, 21 et seq.; Fitzmaurice, this *Year Book*, 33 (1957), pp. 203, 212, 225, 252; Reuter, *Introduction au droit des traités* (1972), p. 135.

<sup>2</sup> *United Nations Conference on the Law of Treaties, Official Records*, First Session, pp. 207–15.

<sup>3</sup> See above, p. 275 n. 7.

<sup>4</sup> See above, n. 1.

<sup>5</sup> See above, pp. 275–6.

<sup>6</sup> Tunkin, *Theory of International Law* (1974), p. 146. Practice cannot create customary law unless it is accompanied by *opinio juris*.

<sup>7</sup> For pre-war examples, see Kopelmanas, this *Year Book*, 18 (1937), pp. 127, 139–40. Tunkin, *op. cit.* (previous note), p. 339, argues that basic provisions of the constituent treaty cannot be amended by practice. This distinction seems illogical (cf. above, p. 275 n. 5). Even if the basic

member States of the organization;<sup>1</sup> others argue that a majority is sufficient.<sup>2</sup> The true solution would appear to be to apply by analogy any amendment clause which exists in the constituent treaty; thus, the United Nations Charter can be amended by a practice supported by two-thirds of the member States, including the five permanent members of the Security Council.<sup>3</sup> If the treaty does not provide for amendment by a majority of the members, subsequent practice can amend the treaty *erga omnes* only if it is unanimous, or, to be more precise, unopposed.<sup>4</sup>

On the other hand, even practice which is opposed by some members can interpret the treaty, especially if the treaty empowers the organization to take decisions by majority vote; the persuasiveness of the interpretative practice varies according to the proportion of the members which support it. There is therefore a temptation for States to argue that practice which conflicts with the treaty is merely an interpretation of it. At all events, the distinction between amendment and interpretation is often blurred in practice.<sup>5</sup> For instance, the practice of the Security Council, whereby an abstention by a permanent member is not treated as a veto, is described by some authorities as an amendment of the Charter<sup>6</sup> and by others as an interpretation.<sup>7</sup>

### *General principles of law*

The expression 'general principles of law' can refer to one of two different things—general principles of international law, and general principles borrowed from municipal law.<sup>8</sup>

General principles of international law are not a separate source of international law. They are simply broad principles, such as the principle of diplomatic immunity or the principle of the freedom of the seas; most of them are principles of customary law, although there is no logical reason why they should not be derived from other sources, such as treaties. Some of them are so well-known that lawyers and judges find it unnecessary to cite authority to support them.<sup>9</sup> Others are more controversial; for provisions are *jus cogens* (which is unlikely to be the case), the tacit consent of the vast majority of the members of a universal organization is probably enough to change *jus cogens*; cf. Tunkin, *op. cit.*, p. 160, and see below, p. 285.

<sup>1</sup> Tunkin, *op. cit.* (above, p. 277 n. 6), p. 339; *Expenses case*, *I.C.J. Reports*, 1962, pp. 151, 191, *per* Judge Spender. Presumably such authorities would not deny that the practice of a majority (or even a minority) of member States can amend the treaty *inter se*; see above, p. 276 n. 8.

<sup>2</sup> Rajan, *United Nations and Domestic Jurisdiction*, second edition (1961), p. 405.

<sup>3</sup> On the other hand, the requirement of ratification laid down in Article 108 of the Charter is a purely procedural formality, which can be waived by the States concerned (*pace* Judge Spender in the *Expenses case*, *I.C.J. Reports*, 1962, pp. 151, 191).

<sup>4</sup> See the author's article on custom, above, p. 1 at pp. 23–4. Cf. Judges Winiarski and Bustamante in the *Expenses case*, *I.C.J. Reports*, 1962, pp. 151, 230–3, 300, although they overlook the implications of Article 108.

<sup>5</sup> Jessup, *A Modern Law of Nations* (1948), p. 16.

<sup>6</sup> Tunkin, *Theory of International Law* (1974), pp. 339–40; Greig, *International Law* (1970), pp. 382–3; Sperduti, *Rivista di diritto internazionale*, 44 (1961), pp. 3, 12; Fitzmaurice, this *Year Book*, 30 (1953), pp. 1, 55; Gross, *American Journal of International Law*, 62 (1968), pp. 315, 328; Judge Bustamante in the *Expenses case*, *I.C.J. Reports*, 1962, pp. 151, 291; Judge de Castro in the *Namibia case*, *ibid.*, 1971, pp. 16, 185–6.

<sup>7</sup> *Namibia case*, *I.C.J. Reports*, 1971, pp. 16, 22, 117, 153–4.

<sup>8</sup> Some principles are general principles of law in both senses, but not all of them are. The attempt by Cheng, *General Principles of Law* (1953), to blur the distinction between the two meanings of general principles of law is unsound; see E. Lauterpacht's review of Cheng's book in this *Year Book*, 30 (1953), p. 544. See also Akehurst, *The Law Governing Employment in International Organizations* (1967), pp. 77–8, and *A Modern Introduction to International Law*, second edition (1971), pp. 51–2.

<sup>9</sup> Sorensen, *Manual of Public International Law* (1968), p. 144.



instance, a lawyer may try to infer from several specific rules of customary law an underlying principle which has not been perceived by anybody else before.<sup>1</sup>

The hierarchical position of general principles of international law depends on the source from which they are derived. However, owing to their generality, they are often ousted by rules of a more specific character (including rules derived from hierarchically lower sources), in application of the maxim *lex specialis derogat generali*.

General principles of law, in the sense of principles borrowed by international law from municipal law, were mentioned in Article 38 of the International Court's Statute in order to enable the Court to fill gaps in treaties and customary law; they can therefore be applied only in the absence of rules (or at least specific rules) of treaty law or customary law.<sup>2</sup> Case law<sup>3</sup> and, with a few exceptions, writers<sup>4</sup> are unanimous in holding that treaties and custom override general principles of law in the event of conflict.

However, it is permissible to use general principles of (municipal) law to interpret treaties and custom.<sup>5</sup> Moreover, general principles of law are sometimes more specific than very broad principles laid down by treaties or customary law, and in such cases the maxim *lex specialis derogat generali* can sometimes lead to general principles of law being applied in preference to very broad principles laid down by treaties or customary law. For instance, the presumption in favour of the liberty of State action, which, according to the *Lotus* case, is a principle of customary law, would suggest that a State is under no duty to pay moratory interest on its debts; and yet the Permanent Court of Arbitration held in the *Russian Indemnity* case that such a duty existed, based on a general principle of (municipal) law.<sup>6</sup>

#### *Judicial decisions and the writings of publicists*

Judicial decisions and the writings of publicists are described in Article 38 of the International Court's Statute 'as subsidiary means for the determination of rules of

<sup>1</sup> Much the same sort of thing happens when existing rules are extended by analogy. An argument by analogy is in effect an argument that specific rules reflect a broader (and often unstated) principle which is applicable not only to the circumstances governed by the specific rules but also to analogous circumstances. On analogy generally, see Giuliano, *Rivista di diritto internazionale*, 20 (1941), p. 69.

In view of the reluctance by Soviet international lawyers to admit that international judges are entitled to extend rules by analogy, it is interesting to note that Soviet law instructs judges to fill gaps in the codes by resort to analogy: David and Brierley, *Major Legal Systems in the World Today* (1968), p. 179. However, such use of analogy is now forbidden in criminal cases, although it used to be practised in Stalin's time, when, for instance, a provision of the criminal code forbidding hunting without a permit was applied by analogy to a man who ran off with another man's wife.

<sup>2</sup> *P.C.I.J., Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee*, 1920, p. 338.

<sup>3</sup> *Russian Indemnity* case (1912), *R.I.A.A.*, vol. 11, pp. 431, 441; *Chorzów Factory* case (1927), *P.C.I.J.*, Series A, No. 13, p. 27, *per* Judge Anzilotti dissenting; *Fisheries* case, *I.C.J. Reports*, 1951, pp. 116, 147-8, *per* Judge Alvarez; *Right of Passage* case, *I.C.J. Reports*, 1960, pp. 6, 43-4; *Castillo v. Zalles* (1955), *I.L.R.* 22, p. 540 (Supreme Court of Chile).

<sup>4</sup> *Le Fur*, *Recueil des cours*, 54 (1935), pp. 5, 213; Habicht, *ibid.*, 49 (1934), pp. 297-8; Rousseau, *Droit international public*, vol. 1 (1970), p. 395; Hsiung, *Law and Policy in China's Foreign Relations* (1972), p. 22; Avramov, *Jugoslovenska revija za međunarodno pravo*, 3 (1959), p. 385. *Contra*, Degan, *L'équité et le droit international* (1970), p. 17 (who regards general principles of law as possessing the same value as treaties and custom), and the authors mentioned below, p. 282 n. 5.

<sup>5</sup> *Le Fur* and Habicht, *loc. cit.* (previous note). For a bold example of this technique, see the *Mosul* case (1925), *P.C.I.J.*, Series B, No. 12, p. 32.

<sup>6</sup> *R.I.A.A.*, vol. 11, p. 431 (see also the dictum on p. 443 about *force majeure*).



law'. This suggests that they have a lower hierarchical value than treaties, custom and general principles of law.<sup>1</sup> Indeed, some writers do not regard them as sources at all, but only as indirect and secondary evidence of rules created by the true sources—treaties, custom and general principles of law.<sup>2</sup>

It is sometimes said that decisions of international courts carry greater weight than decisions of national courts, which in turn carry greater weight than the writings of publicists.<sup>3</sup> This is true more often than not, but there can be exceptions; it would be invidious to name names, but all of us can think of certain writers who have enjoyed a greater reputation than certain judgments of national courts, or of certain judgments of national courts which have enjoyed a greater reputation than certain judgments of international courts. Much depends on the quality of the reasoning which the judge or writer employs.<sup>4</sup> The absence of any rule of binding precedent in international law means that judgments do not always carry greater weight than the writings of publicists.

### *Other possible sources of law*

Having discussed the sources (or pseudo-sources) of international law listed in Article 38 (1) of the International Court's Statute, it remains for us to examine various other things which are sometimes said to be sources of international law.<sup>5</sup>

The position of equity in the hierarchy of the sources of international law is extremely low. It is universally agreed that an international tribunal cannot apply equity in a manner which conflicts with international law unless it has been specifically authorized to do so. In the absence of such an authorization, the most that an international tribunal can do is to use equity to fill gaps in the law and to make equitable exceptions to legal rules. When equitable exceptions are made to legal rules, it sometimes appears as if equity is overriding the law, but this appearance is misleading. All that the judge is doing is holding that the legal rule does not apply to the facts of the case; he is distinguishing it, just as a first-instance judge in England can distinguish a House of Lords decision. The English judge does not deny that the House of Lords decision is binding on him; he merely holds that it does not apply to the facts of the case. An international judge does the same; he does not deny that the legal rule is binding, he merely holds that it does not apply to the facts of the case. The equitable exception is applicable and the legal rule is not, because the equitable exception is more specific than the legal rule; *lex specialis derogat generali*.<sup>6</sup>

Unilateral acts of States are sometimes described as a source of international law by lawyers from civil law countries in Western Europe.<sup>7</sup> However, these acts are so

<sup>1</sup> This is supported by what little authority there is on the topic: Marek, *op. cit.* (above, p. 274 n. 1), pp. 51, 874; British argument in the *Corfu Channel* case, *I.C.J. Reports*, 1949, pp. 4, 99; *South West Africa* cases, *ibid.*, 1962, pp. 319, 576, *per* Judge *ad hoc* van Wyk dissenting; *Barcelona Traction* case, *I.C.J. Reports*, 1970, pp. 3, 315–16 (separate opinion of Judge Ammoun).

<sup>2</sup> e.g. Schwarzenberger, *International Law*, third edition, vol. 1 (1957), pp. 26–8.

<sup>3</sup> Schwarzenberger, *op. cit.* (previous note), pp. 30–7; Fitzmaurice in *Symbolae Verzijl* (1958), p. 172.

<sup>4</sup> Schwarzenberger, *Current Legal Problems*, 9 (1956), pp. 235, 238.

<sup>5</sup> Natural law is discussed below, pp. 282–3.

<sup>6</sup> The way in which an international judge distinguishes customary rules is very similar to the way in which an English judge distinguishes judicial decisions. In the case of treaty provisions, the process of distinguishing takes a slightly different form; the judge bases his decision on the presumed intention of the parties, arguing that the parties cannot have intended the letter of the treaty to apply in cases where it would produce injustice.

<sup>7</sup> Rousseau, *Droit international public*, vol. 1 (1970), pp. 416–32, and the authors cited by him.

heterogeneous that it is very difficult to generalize about them.<sup>1</sup> Very often they are not sources of law. For instance, in many circumstances, protests, waiver and acquiescence are merely steps towards the formation of a customary rule or a prescriptive right, and are therefore not sources of law, or even of legal rights and obligations, in their own right. Similarly, notification (or lack of it) has legal effects only if there is a rule of international law, derived from some other source, which requires notification and attributes legal effects to it; consequently notification is not a source of law, or even of legal rights and obligations, in its own right. However, in other circumstances unilateral acts are sources of law, or at least of legal rights and obligations: a State can sometimes assume obligations by promise or lose rights by waiver (such a promise or waiver may occasionally be inherent in recognition). Such acts are similar in their effects to treaties, and probably have the same hierarchical value as treaties; that is to say, a State can, by promise or waiver, lose liberties or rights which it enjoyed under treaties or customary rules, although a subsequent treaty or custom can extinguish the obligations assumed in the promise or revive the rights lost by the waiver.

Many acts of international organizations are not sources of international law in their own right, either because they are merely part of the practice from which customary international law develops,<sup>2</sup> or because they merely record agreements between (or promises by) States.<sup>3</sup> However, every international organization has an inherent power to take binding decisions on questions which fall within the internal law of the organization: and a power to take binding decisions on other questions may be conferred by the constituent treaty.<sup>4</sup> It would require a separate article to examine the place of such binding decisions in the hierarchy of the sources of international law, because the problems which arise are inseparable from a whole host of questions which form part of the law of international organizations but which would be out of place in a general article on the sources of international law—the principles governing interpretation of constituent treaties of international organizations, the doctrine of implied powers, the questions whether an organ of an international organization can delegate its powers and whether it is bound by its own rules of procedure, the question whether the internal law of an international organization is a separate system of law from international law, the question whether the European Communities are different in nature from other international organizations, the difference between void and voidable acts. The omission of discussion of binding decisions of international organizations from the present article is not as serious as it may seem, because (with the exception of the European Communities and the internal law of international organizations, both of which are specialized topics) international organizations seldom take binding decisions.

### Jus cogens

Everything said hitherto in this article must be regarded as subject to the rules of international law concerning *jus cogens*. In the event of a conflict between a rule of *jus cogens* and a rule of *jus dispositivum*, the rule of *jus cogens* must prevail, regardless of the sources of the conflicting rules, regardless of whether the rule of *jus dispositivum* came

<sup>1</sup> Verzijl, *International Law in Historical Perspective*, vol. 6 (1973), pp. 105–6. The list of such acts given by Rousseau (op. cit., previous note) is as follows: notification, promise, recognition, protest, waiver, acquiescence.

<sup>2</sup> See the author's article on custom, above, p. 1 at pp. 5–8 and 11. Resolutions voted for by member States can interpret or even amend the constituent treaty of the organization; this is also a form of customary law. See above, pp. 277–8.

<sup>3</sup> Castañeda, *Legal Effects of United Nations Resolutions* (1969), chapter 6.

<sup>4</sup> Or by another treaty: Castañeda, op. cit. (previous note), chapter 5.



into existence before or after the rule of *jus cogens*, and regardless of whether the rule of *jus dispositivum* is more specific or less specific than the rule of *jus cogens*.

As regards the sources of international law which can produce rules of *jus cogens*,<sup>1</sup> a wide variety of views has been expressed by writers.<sup>2</sup> Some say that such rules are derived from custom,<sup>3</sup> while others say that they can be derived either from custom or from treaties.<sup>4</sup> A few maintain that they are derived from general principles of law,<sup>5</sup> or from either custom or general principles of law,<sup>6</sup> or from either custom, treaties or general principles of law.<sup>7</sup> Judicial dicta speak of rules of *jus cogens* being derived from treaties<sup>8</sup> or general principles of law,<sup>9</sup> but without apparently implying that they are limited to those sources. Some authorities have argued that treaties or customs which conflict with basic principles of natural law are void;<sup>10</sup> others reject this view.<sup>11</sup>

The *travaux préparatoires* of the Vienna Convention on the Law of Treaties reveal a more consistent picture. The reports of the International Law Commission said that

<sup>1</sup> No one has ever suggested that *all* the rules derived from a particular source are *jus cogens*. References to a source's being capable of producing rules of *jus cogens* merely mean that some of the rules derived from that source are or may be rules of *jus cogens*.

<sup>2</sup> In addition to the writers listed below, see also the writers whose views are summarized in Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties* (1974), pp. 74-6, and Carnegie Endowment for International Peace, *The Concept of Jus Cogens in International Law* (1967), pp. 12 and 26-49.

<sup>3</sup> Brownlie, *Principles of Public International Law*, second edition (1973), p. 500; Reuter, *Introduction au droit des traités* (1972), pp. 139-40.

<sup>4</sup> Verzijl, *International Law in Historical Perspective*, vol. 1 (1968), p. 85; Hsiung, *Law and Policy in China's Foreign Relations* (1972), p. 29; Le Fur, *Recueil des cours*, 54 (1935), p. 43; Verdross, *American Journal of International Law*, 60 (1966), pp. 55, 61; Morelli, *Rivista di diritto internazionale*, 51 (1968), pp. 108, 110; Aleksidze, *Soviet Year Book of International Law* (1969), pp. 127, 149; Tunkin, *Theory of International Law* (1974), p. 158, citing McNair.

<sup>5</sup> Von der Heydte, *Die Friedenswarte*, 33 (1933), pp. 289, 290, 297-8; Härle, *Revue de droit international et de législation comparée*, third series, 16 (1935), p. 663, 680-1; Verdross, *Annuaire de l'Institut de droit international* (1937), pp. 186-9. These authors considered that general principles of law were normally subsidiary to treaties and custom; only a few general principles of law were *jus cogens*, overriding treaties and custom. Such views represented only a passing phase in the thinking of Verdross; cf. his earlier views in *Annuaire de l'Institut de droit international* (1932), pp. 292-3, and his later views in the article mentioned in the previous note.

<sup>6</sup> Mann, in *Festschrift für Ulrich Scheuner* (1973), pp. 399, 401.

<sup>7</sup> P. de Visscher, *Recueil des cours*, 136 (1972), pp. 1, 107.

<sup>8</sup> Koch case (1959), I.L.R. 30, pp. 496, 503.

<sup>9</sup> *Right of Passage* case, I.C.J. Reports, 1960, pp. 6, 135, 139-40, per Judge ad hoc Fernandes dissenting; *South West Africa* cases, ibid., 1966, pp. 6, 298, per Judge Tanaka dissenting.

<sup>10</sup> Vattel, *The Law of Nations*, introduction, paragraphs 9 and 26, and Book II, paragraph 161; Koster, 'Les fondements du droit des gens', *Bibliotheca Visseriana*, 4 (1925), pp. 183-7; Kunz, *American Journal of International Law*, 47 (1953), pp. 662, 666; *North Sea Continental Shelf* cases, I.C.J. Reports, 1969, pp. 3, 193, per Judge Tanaka dissenting. See also the writers cited by Sztucki, op. cit. (above, n. 2), pp. 59, 66, 110.

Many writers say that immoral treaties are void. However, although natural law can possibly be regarded as a formal source of international law, morality clearly cannot. The writers who argue that immoral treaties are void do not generally say what the formal source of this rule is. It might be natural law; alternatively, it might be customary law or some other 'positivist' source.

<sup>11</sup> See the writers listed in Sztucki, op. cit. (above, n. 2), pp. 60-6. See also *The Antelope* (1825), 23 U.S. 66, 120-2 and *The Enterprise* (1855), Moore, *International Arbitrations*, vol. 4 (1898), pp. 4349, 4360-1, 4373, 4377. In addition, many writers, especially before 1960, denied the existence of any form of *jus cogens*, and therefore opposed the view that treaties and custom conflicting with natural law were void: Sztucki, op. cit., pp. 55-8, and Koster, loc. cit. (previous note), pp. 187-9. Authorities basing *jus cogens* solely on treaties, custom and/or general principles of law must also be regarded as rejecting the view that natural law can be a formal source of *jus cogens*.



*jus cogens* could be established by treaty or by custom.<sup>1</sup> At the Vienna Conference, some States said that *jus cogens* could be derived from custom,<sup>2</sup> or treaties,<sup>3</sup> or both.<sup>4</sup> The view that treaties are one of the possible sources of *jus cogens* also receives support from speeches by several delegates who listed rules contained in the United Nations Charter or in other treaties as examples of *jus cogens*, without stating that those rules were also rules of customary law.<sup>5</sup>

There was little support at the Conference for the view that *jus cogens* could be derived from rules other than treaties and custom. In particular, a United States amendment, defining a rule of *jus cogens* as a rule 'which is recognized in common by the national and regional legal systems of the world and from which no derogation is permitted', which might have been interpreted as defining *jus cogens* by reference to general principles of law (although delegates differed as to the true meaning of the amendment), was defeated by 57 votes to 24, with 7 abstentions.

Some delegates at the conference said that the provisions of the Convention concerning *jus cogens* gave effect to principles of international morality.<sup>6</sup> That may be true, but the important thing to note is that the Convention defined a rule of *jus cogens*, not by reference to subjective notions like morality, but as a 'norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'.<sup>7</sup> Moreover, the consensus at the conference was apparently that rules of *jus cogens* could be derived only from treaties and/or custom; in other words, principles of international morality had to take the form of conventional or customary rules of international law in order to have any chance of becoming *jus cogens*.<sup>8</sup>

Moreover, there are arguments of principle which support the view that *jus cogens* can be derived from treaties and custom, but not from other sources of international law. We have already seen that treaties and custom are normally of equal authority as sources of international law, and override other sources. It would be an anomalous departure from that general pattern if rules of *jus cogens* could be derived from custom but not from treaties (or vice versa), or if other sources, which are normally inferior to treaties and custom, could produce rules of *jus cogens* which would override treaties and custom. Furthermore, the Vienna Convention says that a rule of *jus cogens* must be

<sup>1</sup> *American Journal of International Law*, 58 (1964), pp. 265-6 and 291; *ibid.*, 61 (1967), p. 411 ('the jurisprudence of international tribunals', mentioned on p. 410, was probably intended to serve as evidence of existing rules of *jus cogens*, not to create new rules of *jus cogens*).

<sup>2</sup> *United Nations Conference on the Law of Treaties, Official Records*, First Session, pp. 295 (Greece), 311 (Italy, but see below, n. 5), 320 (Ivory Coast).

<sup>3</sup> *Ibid.*, p. 315 (Ethiopia); *ibid.*, Second Session, p. 97 (Ecuador and Cuba). These States made it clear that they did not regard treaties as the sole source of *jus cogens*.

<sup>4</sup> *Ibid.*, First Session, pp. 297 (Cuba), 298 (Chile), 302 (Poland), 326 (Malaysia), 327 (Trinidad), 387 (Cyprus); *ibid.*, Second Session, p. 99 (Poland).

<sup>5</sup> *Ibid.*, First Session, pp. 294 (U.S.S.R.), 296 (Kenya), 297 (Cuba and Lebanon), 298 (Nigeria), 300 (Sierra Leone), 301 (Madagascar), 302 (Poland), 307 (Byelorussia), 311 (Italy), 317 (Australia), 318 (Czechoslovakia), 320 (Ecuador), 324 (Switzerland); *ibid.*, Second Session, pp. 96-7 (Ecuador) and 100 (Ukraine).

<sup>6</sup> Capotorti, *Recueil des cours*, 134 (1971), pp. 417, 522.

<sup>7</sup> Italics added. These words have distinctly positivist or consensual overtones.

<sup>8</sup> A few members of the International Law Commission and a few delegates at the conference said that *jus cogens* was based on natural law; a few others attacked this view (Sztucki, *op. cit.* (above, p. 282 n. 2), pp. 60-3). The view of the majority seems to have been that *jus cogens* could be derived only from treaties and/or custom, thus impliedly rejecting the view that natural law could be a formal source of *jus cogens* independently of treaties and custom. Rules of natural law would therefore have to be incorporated in treaties or custom before they stood any chance of becoming *jus cogens*.

'accepted and recognized by the community of States as a whole'<sup>1</sup>—an expression which, as we shall see in a moment, is not free from difficulty, but which surely suggests that a rule of *jus cogens* cannot come into being unless it is accepted and recognized by at least a very large number of States, including the two super-powers. But the Soviet Union refuses to recognize any sources of international law other than treaties and custom. This negative attitude, coupled with the definition of *jus cogens* given in the Vienna Convention, presents an almost insuperable obstacle to the development of *jus cogens* out of any source other than treaties and custom. Finally, as far as general principles of (municipal) law are concerned, not all principles of municipal law are suitable for transposition to the international environment, and the factors which make a broad definition of *jus cogens* workable in municipal law hardly exist in international law;<sup>2</sup> it is therefore a great mistake to argue that the fact that a particular rule is *jus cogens* in all municipal legal systems means that it is *jus cogens* in international law also.

One of the requirements which must be met, according to the Vienna Convention, before a rule can be regarded as a rule of *jus cogens*, is that it must be a rule of 'general international law'. Some writers identify general international law with customary law.<sup>3</sup> However, this is doubtful. A treaty which has been ratified by all or almost all the States in the world is as much a part of general international law as most customary rules. Similarly the use of the word 'emerges' in Article 64 of the Vienna Convention seems at first sight more apt to describe the gradual development of a customary rule than the conclusion of a treaty. But it does not necessarily rule out treaties, because it may take a long time for a treaty to receive a sufficiently large number of ratifications for the treaty to be regarded as *jus cogens*. Besides, the French text uses the word 'survient', and, as the French delegate at the Vienna Conference said, 'the dictionary definition of the French verb "survenir" implied something sudden and unexpected'.<sup>4</sup>

A more serious difficulty arises from the requirement, laid down in Article 53 of the Vienna Convention, that a rule of *jus cogens* must be 'accepted and recognized by the international community of States as a whole'. Some delegates at the Vienna conference thought that rules of *jus cogens* must be accepted by all States;<sup>5</sup> others thought that they must be accepted by an overwhelming majority of States, but not by all.<sup>6</sup> Each interpretation gives rise to problems.

The 'unanimity' interpretation would make the development of *jus cogens* difficult—and would make the development of *jus cogens* by treaty extremely difficult, because it is most unlikely that all the States in the world would be parties to a treaty. However, it is not a logical impossibility that all the States in the world might become parties to a treaty.<sup>7</sup>

<sup>1</sup> Italics added.

<sup>2</sup> Marek, in *Mélanges Guggenheim* (1967), pp. 426, 429 et seq.; Rousseau, *Droit international public*, vol. 1 (1970), p. 150; Sinclair, *The Vienna Convention on the Law of Treaties* (1973), pp. 114–15.

<sup>3</sup> e.g. Thirlway, *International Customary Law and Codification* (1972), p. 97.

<sup>4</sup> *United Nations Conference on the Law of Treaties, Official Records*, Second Session, p. 124, para. 77. The Spanish text uses the words 'aparición' and 'sorge'.

<sup>5</sup> *Ibid.*, First Session, p. 294, para. 12 (Finland), p. 295, para. 17 (U.S.A.) and para. 19 (Greece), p. 311, para. 40 (Israel), p. 323, para. 16 (Philippines); *ibid.*, Second Session, p. 96, para. 29 (West Germany).

<sup>6</sup> *Ibid.*, First Session, p. 301, para. 19 (Ghana), p. 312, para. 52 (New Zealand), p. 317, para. 17 (Australia), p. 318, para. 25 (Czechoslovakia); *ibid.*, Second Session, p. 106, para. 63 (Libya). See also the statement by the Chairman of the Drafting Committee, *ibid.*, First Session, p. 471, para. 7, and p. 472, para. 12.

<sup>7</sup> See also below, p. 285 n. 4.

The 'overwhelming majority' interpretation causes more difficulties. The normal rule is that a State is not bound by a treaty to which it is not a party. In certain circumstances a dissenting State is not bound by rules of customary law; indeed, the *travaux préparatoires* of Article 38 of the Vienna Convention suggest that a State is not bound by a new customary rule unless it has positively consented to that rule.<sup>1</sup> What happens to the States which oppose the creation of a rule of *jus cogens*? Some authorities argue that they are not bound by it.<sup>2</sup> This is logical, but undesirable; *jus cogens* would lose much of its *raison d'être* if States could escape its binding force by dissenting from it. Other authorities argue, rather illogically, that dissenting States are bound by customary rules of *jus cogens* but not by customary rules of *jus dispositivum*;<sup>3</sup> however, apparently nobody has yet argued that treaties laying down rules of *jus cogens* are binding on States which are not parties to them.

The true solution is probably that the dispute between the 'unanimity' interpretation and the 'overwhelming majority' interpretation is more apparent than real. There are two questions involved—how many States must recognize a rule as law, and how many must recognize it as *jus cogens*? Most of the delegates who spoke in favour of the 'unanimity' interpretation were addressing their minds to the first question, and most of the delegates who spoke in favour of the 'overwhelming majority' interpretation were addressing their minds to the second question. The true answer appears to be that a rule, in order to qualify as *jus cogens*, must pass two tests—it must be accepted as law by all the States in the world,<sup>4</sup> and an overwhelming majority of States must regard it as *jus cogens*.<sup>5</sup>

<sup>1</sup> See the author's article on custom, above, p. 1 at pp. 23–7, especially p. 24 n. 1.

<sup>2</sup> Tunkin, *Theory of International Law* (1974), pp. 158–9. Cf. Lukashuk, in *Carnegie Endowment Conference on the Process of Change in International Law*, ed. Zacklin (1965), pp. 20–1, who says that a State can choose between accepting rules of *jus cogens* and not being regarded as a member of the international community.

<sup>3</sup> *United Nations Conference on the Law of Treaties, Official Records*, First Session, p. 197, para. 73, and p. 444, para. 49 (Venezuela); Aleksidze, *Soviet Year Book of International Law* (1969), pp. 127, 149; Thirlway, *International Customary Law and Codification* (1972), p. 110; Bokor-Szegö, *New States and International Law* (1970), chapter 2.

<sup>4</sup> In the case of a treaty, this would mean that all the States in the world must be parties to the treaty. In the case of a customary rule, positive consent by all States is not necessary, despite some unfortunate statements to the contrary at the Vienna Conference; it is sufficient that some States accept the rule and that other States do not dissent from it (see above, pp. 23–7). The unanimity requirement would be met if some States were parties to a treaty laying down the rule and if the rule were binding on all other States *qua* customary rule.

<sup>5</sup> According to the principle of *acte contraire*, a rule of *jus cogens* will cease to be *jus cogens* if the overwhelming majority of States decide that it is no longer *jus cogens*—even though it may still remain a rule of law (cf. Tunkin, *Theory of International Law* (1974), p. 160). The final relative clause in Article 53 of the Vienna Convention on the Law of Treaties is badly drafted, because it implies that a rule of *jus cogens* can be replaced only by a rule of *jus cogens* and not by a rule of *jus dispositivum*.



## EMPIRICAL AND DOCTRINAL POSITIVISM IN INTERNATIONAL LAW\*

By PROFESSOR C. H. ALEXANDROWICZ

The reader of post-war German literature on Afro-Asian history (including the history of the Law of Nations) must be astonished to find in so many publications a concerted attack<sup>1</sup> on the nineteenth-century German historian Leopold Ranke. The attack aims at Ranke's classification of nations into those which made history (*Geschichtsbildende Völker*) and those which lack history (*Geschichtslose Völker*). The classification is of vital interest to the New States, most of which are supposed to be *geschichtslos*. Some of them have already publicly protested, to mention only India and Ceylon. The question arose in the Indo-Portuguese dispute over the right of passage to the enclaves of Dadra and Nagar Aveli before the International Court of Justice and found particular expression in Judge Moreno Quintana's dissenting opinion in which he contended that India is not a New State but has reverted to sovereignty.<sup>2</sup> As to Ceylon, its representative in the General Assembly (Sixth Committee) objected expressly in 1968 and 1969 to the classification of Ceylon as a New State. Ceylon, he said, cannot be considered *geschichtslos*. It existed as an independent State for centuries with the exception only of the colonial interlude lasting less than 150 years.<sup>3</sup>

Among the critics of Leopold Ranke, Kurt Büttner<sup>4</sup> deserves special mention. He discusses Ranke's impact on nineteenth-century international lawyers who considered the Afro-Asian countries as deprived of any State organization and being *völkerrechtlich herrenlos*, i.e. in a legal vacuum. During the same year in which Büttner published his work (1959) a Conference on African history held in Leipzig stated that 'one of the most pernicious theories used by the defenders of colonialism is based on the view that the world is composed of nations which made history and of nations which lack history, the Afro-Asian countries being classified as lacking history'.<sup>5</sup> History or lack of history conditioned their present-day status.

Büttner returned to his attack on Ranke in 1965 when he published his *Problems of the History of Africa*.<sup>6</sup> He asks the vital question what is the objective criterion at the basis of Ranke's ideology which would justify his classification of nations. Ranke, he says, conceived the idea of two great areas of culture (*Kulturkreise*), the area of cultured nations and the area of primitive nations (*Kultur- and Naturvölker*). The search for such an objective criterion is bound to remain futile. In this respect Büttner refers to the African Empires of the past such as the Empire of Ghana (ninth to eleventh

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<sup>1</sup> Such as in the publications by Kurt Büttner, Thea Büttner, Heinrich Loth, Hans Murakovsky and others (quoted below in detail).

<sup>2</sup> *I.C.J. Reports*, 1960, p. 6.

<sup>3</sup> See 'New and Original States' by the author, in *International Affairs*, vol. 45, no. 3 (1969), p. 465.

<sup>4</sup> Kurt Büttner, *Die Anfänge der deutschen Kolonialpolitik in Ost Afrika (eine kritische Untersuchung an Hand uneröffentlichen Quellen)*, Berlin (1959).

<sup>5</sup> *Geschichte und Geschichtsbild Afrikas* (1960), p. 222 (*Beiträge der Arbeitstagung für neuere und neueste Geschichte Afrikas*, 17-18 April 1959, Leipzig).

<sup>6</sup> Kurt Büttner, 'Probleme der Geschichte Afrikas', *Wissenschaftliche Zeitschrift der Universität in Leipzig, Gesellschafts und sprachwissenschaftliche Reihe*, 14 Jg. (1965), H. 1, pp. 701, 710.

centuries), the Empire of Mali (thirteenth to fifteenth centuries) and the Empire of Monomotapa with which the Portuguese made a treaty in 1629. At that period the African State organization (hitherto so rich in history) started declining, and it declined more and more with the increasing pressure of European colonial expansion. Büttner states that historical research has shown that until the sixteenth century the advanced countries of Africa were not behind other continents. There were no racially conditioned causes of backwardness in Africa. Stagnation set in or coincided with the advent of the Europeans. The same convincing arguments have been brought forward by Van Leur in respect of Asia.<sup>1</sup>

Another writer (Thea Büttner) concerned herself with the time-table of development of civilizations in various parts of the world.<sup>2</sup> Continents had different time-tables of social and economic growth, and their political structures and status in the Family of Nations grew accordingly. Feudalism came to an end earlier in Europe than in Asia or Africa, but that hardly justifies the view that the two continents were backward in the past. Neither does it explain the classification of nations into those which made history and those which lack history, for this must lead to a distortion of the universal history of the Family and Law of Nations. Moreover, the classification was invented when little was known of Afro-Asian history. In spite of hundreds of treaties concluded between European and Afro-Asian countries prior to the nineteenth century, the history of the latter has been systematically explored in the twentieth century only. Thus arose the fallacy of classifying non-European nations as lacking history: they were considered as *geschichtslos* because their history was unknown, not because it was lacking.

Another German writer, Heinrich Loth,<sup>3</sup> in his *Colonial History* (1963) refers to Treitschke's views on the capacity of extra-European nations to make history. Treitschke speaks about the legal institutions which 'our philosophers conceived for the world' and further of the European school of legal thought which 'originated from the depths of the German spirit . . . and conceived the juridical life of nations as an eternal process of development'.<sup>4</sup> No objective criterion of classification of nations was capable of emerging out of this sort of irrational inspiration.

Loth concerns himself with the treaties concluded between European powers and African Rulers and rejects the presumption (not justified by generally valid evidence) that 'the readiness of Rulers to conclude treaties of protection . . . can be ascribed to their ignorance'. M. F. Lindley<sup>5</sup> made a careful inquiry into the problem and warned international lawyers of the danger of generalizations. It is also of great interest to read in the work of Loth the correspondence between African Rulers *inter se* (e.g. between those in Namibia) which shows a perfect awareness of the imminent loss of sovereignty which German colonial penetration was likely to bring about.<sup>6</sup> The conviction of European writers as to the absence of Statehood in Africa and Asia is hardly justified if

<sup>1</sup> J. C. Van Leur, *Indonesian Trade and Society* (1960) (published in Bandung for the Royal Tropical Institute, Amsterdam).

<sup>2</sup> Thea Büttner, 'Zu Fragen des Standortes der historischen und ethnologischen Literatur zur Geschichte Afrikas in der vorkolonialen Zeit', *Wissenschaftliche Zeitschrift der Universität in Leipzig* (as above, p. 286 n. 6), Jg. 14 (1965).

<sup>3</sup> Heinrich Loth, *Studien zur Kolonialgeschichte und Geschichte der nationalen und kolonialen Befreiungsbewegung (die christliche Mission in S.W. Afrika)* (1963), pp. 7, 96, 102, 111, Appendix 11, 17.

<sup>4</sup> Loth, op. cit. (above, n. 3), p. 7.

<sup>5</sup> M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926).

<sup>6</sup> Loth, op. cit. (above, n. 3), Appendix, Documents, Reichskolonialamt (RKA), No. 17.

it is realized that no European power wished to acquire territory by conquest or unilateral occupation but by negotiation with the legitimate bearers of sovereign rights from whom territory could be acquired bilaterally by title of cession.

Another writer, Hans Murakovsky, describes in his *Africa, Past and Present*<sup>1</sup> the contemporary research of German writers as showing 'the end of the great fallacy of any inherent superiority of Europe'. He states that 'the culture of mankind cannot be ascribed to any single group'. The realization of this fact 'emerges out of the mist of conflicting European nationalisms which raged against each other for so long'. Murakovsky points out that unknown Africa is well known today and its history has joined the stream of world history. Can it really be considered *geschichtslos*?

In an attempt to define 'world history' Ranke fell into the *pars pro toto* fallacy of identifying European history with world history. To international lawyers the correction of this fallacy is essential, for the New States, many of which had maintained treaty and diplomatic relations with European powers prior to the nineteenth century, are now concerned with their position in the Family of Nations in which past and present are equally relevant to defining status.<sup>2</sup>

The concept of the *European* Law of Nations emerged only in the second half of the eighteenth century. It did not really exist before, simply because there was no consistent Concert of Europe in the nineteenth-century meaning. The only concentration of political power in Europe had been in the Holy Roman Empire which covered only part of Europe, excluding France, England, Scotland and East Europe. Spain had been connected with it for a while through a common dynasty (the Habsburgs) and Italy remained the playground of the conflicting interests of the Powers. There was no reason for conceiving a European Law of Nations. The Law of Nations was inherently a universal concept, conditioned by its affiliation with the law of nature and by the highly important and world-wide relations on a footing of equality between the European Powers and the East Indian and North African Rulers joining in a great trade adventure. The treaties and documents of diplomatic and commercial relations emerging from European and extra-European State practice piled up in the course of the sixteenth, seventeenth and eighteenth centuries and were gradually sorted out by the late eighteenth-century positivists, among whom C. F. de Martens was the most systematic one. It was the period of transit of the law of nations from the natural law ideology to positivism, and it would have been logical if the positivists had proceeded in an empirical way, taking the whole material as a basis for extracting rules of international law. For positivism is an empirical concept relying on State practice. It contrasted itself with the doctrinal approach to the law which was characteristic of the law of nature.

G. F. de Martens quotes among treaties in his *Précis du droit des gens*<sup>3</sup> at least eighty treaties concluded with Afro-Asian countries. He collected more of these treaties in his *Recueil* and *Cours diplomatique*.<sup>4</sup> Some of these treaties provided for capitulations on behalf of Asian or African traders in Europe. Why have these treaties not been accepted as reliable historical source material on the same level as inter-European treaties from which rules of international law could be drawn? Omitted in

<sup>1</sup> Hans Murakovsky, *Afrika, Geschichte und Gegenwart*, Vienna (1961), pp. 7, 39, 66.

<sup>2</sup> Büttner, 'Probleme der Geschichte Afrikas' (above, p. 286 n. 6), p. 703, and Leopold von Ranke, *Weltgeschichte*, vol. 1 (1880), p. 18 (as quoted by Büttner).

<sup>3</sup> G. F. de Martens, *Compendium of the Law of Nations* (translated by William Cobbett), London (June 1802), List of Treaties, pp. 357-454.

<sup>4</sup> G. F. de Martens, *Recueil des traités* (1791, 1817), and *Cours diplomatique* (1801) by the same author.



his *Literature of the Law of Nations*<sup>1</sup> had already been puzzled by the non-extension of positivist international law from Europe to other continents which through treaties and diplomatic and commercial relations had close connections with European powers. The concept of universality of international law declined with the decline of the natural law doctrine, but why has it been impossible to build universality into the positivist reality of international law? The reason seems to be that positivism, in its endeavour to be empirical and in its determination to do away with doctrinal international law (based on the law of nature and nations) became itself doctrinal, adopting as much of the factual historical material as it wished to, and rejecting the remainder. The rejection of extra-European source material was instrumental in building up a new *European* (pseudo-universal) international law. This was hardly an empirical exercise. It was doctrinally eurocentric and bound to falsify history. The problem is of concern to international lawyers who deal with the entry of the New States or the so-called New States into the Family of Nations.

The question has been asked what is the attitude of the New States to existing international law as they find it at their entry into the orbit of international law. One view is that they are born into it and have little choice. This view is obviously not confirmed by actual (empirical) State practice of our days.<sup>2</sup> In fact, the New States do not accept certain principles of international law in the making of which they had no share in the nineteenth century. On the other hand, if it is true to say that many of the New States have an identity with States in the classic past such as India, Ceylon, Madagascar, Algeria and other States, they cannot be considered as *geschichtslos*. They had a presence in the pre-colonial Family of Nations and must be considered as participants in law-making in the classic period. To that extent they are bound to accept the traditional structure of international law and some of its fundamental principles. While they now exercise the choice of accepting or rejecting certain rules of *jus dispositivum*, they have not rejected the idea of *jus cogens*, which they are ready to acknowledge as a peremptory law from which no derogation is permitted.<sup>3</sup>

Whatever the ultimate outcome of the present transformation of international law caused by the appearance or reappearance of the Afro-Asian States, it is important not to apply to such transformation doctrinal positivism. Positivism is by its nature empirical and should respect and follow the facts of international life without any *a priori* discrimination. The error committed by Ranke and his followers of identifying Western history with universal history and of classifying nations into those who make history and those who lack history should be avoided. The pride of nations in their history must be mutually respected. It will certainly take the sting of bitterness out of the colonial controversy, which is no more than an ordinary chapter of power politics.

<sup>1</sup> D. H. L. Ompteda, *Literatur des gesamten sowohl natürlichen wie positiven Völkerrechts* (1785).

<sup>2</sup> R. P. Anand, *New States and International Law* (1972).

<sup>3</sup> H. Bokor-Szegö, *New States and International Law* (1970).

## SOME LEGAL PROBLEMS OF THE CHANNEL TUNNEL SCHEME, 1874-1883\*

By GEOFFREY MARSTON<sup>1</sup>

### A. THE NEGOTIATIONS

During the first seventy years of the nineteenth century, various schemes were put forward, mostly in France, for constructing a tunnel to link England and France.<sup>2</sup> These schemes caused some discussion of the status of the subsoil of the Channel in international law, but it was not until 1874 that the municipal law status of the submarine land below low-water mark began to concern the British executive. It is desirable to state at the outset that by Section 7 of the Crown Lands Act 1866 'all such Parts and Rights and Interests as then belong to Her Majesty in right of the Crown of and in the Shore and Bed of the Sea' were transferred from the management of the Commissioners of Woods to that of the Board of Trade. By Section 21 of the same Act the management of coal, stone and other minerals, and of mines thereof, below high-water mark remained the responsibility of the Commissioners of Woods.

The occasion for concern was the passing of the South Eastern Railway Company Act 1874<sup>3</sup> which authorized that Company to spend £70,000 on borings and other works with the aim of constructing a Channel tunnel. This Act, promoted by the Company's chairman, Sir Edward Watkin, M.P., was not the only Parliamentary activity of its kind. In late 1874, the Channel Tunnel Company, an Anglo-French consortium, gave notice in Parliament of a Bill in which it sought approval for the power to acquire lands for the purpose of carrying out preliminary experimental operations. A chart annexed to the Bill showed that the lands included an area below low-water mark in St. Margaret's Bay, Kent. On 15 January 1875 the Commissioner of Woods and Forests, Charles Gore, wrote to the Treasury about the latter scheme. In the course of his letter, Gore stated:

Foreshore is ordinarily understood to mean the land lying between high Water mark and low water mark and land so situated is often claimed by subjects under Grants from the Crown. But the greater part of the Works of the Company if carried out as designed will be executed under the bed of the Sea below Low water mark which as far as the territory of England extends in the direction of France is indisputably the property of the Crown. It may be open to question what is the exact limit seaward of the Territory of England. The area of Coal adjacent to Durham which has been already let by this Department on behalf of the Crown to the Marquis of Londonderry and other Lessees extends seaward to a distance of two miles from high water mark. Such distance not being fixed as the limits of the Crown's right to Coal but only as the extent to which that right is demised. And the Cornwall Submarine Mines Act 1858 does not mention any specific distance from low water mark as the limit of the Crown's right to Under-Sea Mines. So also the Licenses granted by me to Submarine Telegraph Companies authorize

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<sup>2</sup> See, e.g., the summary set out in a letter dated 17 November 1871 from the Channel Tunnel Committee to the Foreign Secretary, *British and Foreign State Papers*, vol. 68, pp. 657-8; C. J. Colombos, *Le Tunnel sous la Manche et le droit international* (1917), ch. 1.

<sup>3</sup> Local Acts, 37 & 38 Vict. c. ciii.

the laying of Cables on the bed of the Sea from low water mark as far as British Territory extends without any definition of Seaward limits. With respect to the Water space of the Sea the right of British subjects to an exclusive right of fishing is so far as France is concerned governed by a Convention between the two Countries which was confirmed by the Act 31 & 32 Vic. c. 45 and which (with some exceptions) fixes 3 miles from low water mark as the distance within which the exclusive right of fishing of the subjects of each Country is to be exercised. But that provision is only a matter of treaty regulation made for a limited period (10 years from 1868) and is in no way binding as to the right to the soil of the bed of the Sea. In the case of a Mine worked under, or an Island newly formed in, the Straits of Dover, it is difficult to see that any limit could be justly assigned as the end of British Territory short of the *medium filium aquae* between England and France. . . .

Whatever may be adopted as the line of frontier under the Sea between England and France it is clear that for 3 miles at the least the Tunnel will be constructed through substrata belonging to the Crown of England and the question at once presents itself on what terms if at all the consent of the Crown should be given to the execution of the Work in question.<sup>1</sup>

The Permanent Under-Secretary to the Board of Trade, T. H. Farrer, was less pessimistic about the legal problems. On 20 January 1875 he wrote to the Foreign Secretary:

The Bill merely proposes to empower the Company to acquire for the purpose of preliminary experiments certain lands (including foreshore and bed of the sea within the British territorial limits) at St. Margaret's Bay, Dover.<sup>2</sup>

The Treasury then suggested that a joint Anglo-French commission be set up. This was agreed to by the Foreign Office and the French Government. The British members of the Joint Commission were C. M. Kennedy of the Foreign Office, Captain Tyler of the Board of Trade and Horace Watson, Solicitor to the Department of Woods and Forests.<sup>3</sup> They heard evidence in April and May 1875 and presented their preliminary report to the Treasury on 10 May 1875. This report contained the following passage:<sup>4</sup>

*Art. 5. Limits of Nationality and Jurisdiction.* In the Report dated the 13th July, 1874, of a French Commission on the subject of the Submarine Railway, it is stated that the question of the right of property in the bed of the sea is one which has only a theoretical interest. But it may be doubted whether, on the present occasion, it will not be necessary to deal with that question as being one of practical importance. It is presumed that, by the law of France, the right of property in all unappropriated soil is vested in the State, as it is in this country in the Crown, and that such right includes the soil of the bed of the sea, to the distance seaward to which the country extends, subject, of course, to any public rights of navigation, anchorage, fishing, etc. In England this right of the State or the Crown is now the source of a substantial revenue derived from mines worked under the sea adjacent to Cumberland, Cornwall, Durham, etc.; and for the working of mines under

<sup>1</sup> CREST 37/318. This and all other archival references in this article are to papers preserved in the Public Record Office, London.

<sup>2</sup> Farrer to Tenterden, C. 3358, p. 40. The main published official source is a Command Paper, 'Correspondence with reference to the proposed construction of a Channel Tunnel', C. 3358; *House of Commons Sessional Papers*, 1882, vol. LIII, p. 1. Joseph Chamberlain, President of the Board of Trade, stated in Parliament on 15 August 1882 that every 'shred and scrap of correspondence of a public nature' had been included in it (*Hansard's Parliamentary Debates*, Third Series, vol. 273, col. 1821). Some additional inter-departmental and diplomatic correspondence is found in seven Foreign Office case volumes, F.O. 27/2214-2219 inclusive, 2901.

<sup>3</sup> For the letters of appointment dated 22 March 1875, see *British and Foreign State Papers*, vol. 66, pp. 472-3.

<sup>4</sup> C. 3358, pp. 87-8.



the sea adjacent to Cornwall, facilities have been provided by Parliament in 'The Cornwall Submarine Mines Act, 1858'. It is apprehended that the jurisdiction of the Legislature of Great Britain is, as regards foreign nations, not less extensive than the Crown's right of property in the soil of the bed of the sea, and that such jurisdiction extends to a distance of 3 miles, at least, from the English coast. If a mine or tunnel were driven under the sea towards France to a greater distance than 3 miles, it is apprehended that, to the extent of the space comprised in the mine or tunnel, the work would be situate in England, and would belong to the Crown (and become subject to the jurisdiction of the British Parliament), if by no other title, at all events by the title which would be derived from the first occupancy and possession of that which would be practically a prolongation of, or an addition to, the territory of the country from or in which the mine or tunnel was driven. The right would, of course, be limited to the space actually occupied and possessed, and would not be in any way antagonistic to, or an interference with, any rights of other nations to navigate, to cast anchor, and to fish in the high sea (outside the natural territorial limits of the country), above the mine or tunnel. It is doubtless possible to suppose a case which might give rise to a question by the foreign State on the opposite coast, as, for instance, if the proposed tunnel were driven from the English coast until it got beyond the mid-channel, or even to the limit of 3 miles from France. But no such question could arise if a preliminary Treaty were made defining the limits of the respective ownerships and jurisdictions of the two countries, and it seems to be desirable that such a course should be adopted on the present occasion.

What, then, must be the common boundary of England and France in the Submarine Tunnel?

It is apprehended that this question can receive only one satisfactory answer, viz., that the boundary must be half-way between low-water mark in France and low-water mark in England. This boundary could be readily ascertained and marked out under the direction of the Mixed Commission.

It is proposed, therefore, to recommend that the boundary between England and France in the Channel Tunnel shall be so ascertained before the railway is opened for public traffic; and shall be half-way between low-water mark (above the tunnel) on the coast of England, and low-water mark (above the tunnel) on the coast of France.

This definition of boundary will be for the purposes of the tunnel and railway only, and will not, as regards the sea over the tunnel, in any way affect any question of nationality, or any rights of navigation, fishing, or anchoring, or other rights.

The French members of the Joint Commission then delivered a report dated 12 October 1875<sup>1</sup> in which they commented on the preliminary report of the English members. After referring to the construction of international railways, they continued:

*A la vérité, la situation n'est pas exactement la même dans le cas d'un chemin de fer sous-marin, parce que, au delà du territoire propre à chaque nation et défini par la ligne du niveau des plus basses eaux, il existe un espace à l'égard duquel des droits de propriété peuvent sembler incertains.*<sup>2</sup>

The British members then revised their draft. The new version began:

Article 1. The boundary between England and France in the tunnel, when constructed, shall be half-way between low-water mark (above the tunnel) on the coast of England, and low-water mark (above the tunnel) on the coast of France. . . . The definition of boundary provided for by this Article shall have reference to the tunnel and [submarine] railway only, and shall not in any way affect any question of the nationality of, or any rights of navigation, fishing, anchoring, or other rights in, the sea above the tunnel, or elsewhere than in the tunnel itself.<sup>3</sup>

This Article was accepted, with the addition of the word 'submarine' as indicated

<sup>1</sup> C. 3358, pp. 132-6.

<sup>2</sup> *Ibid.*, p. 133.

<sup>3</sup> *Ibid.*, p. 139.

above, as part of a Protocol *ad referendum* which was signed by all the Joint Commissioners on 5 February 1876.<sup>1</sup> This Protocol was designed to regulate as between Britain and France the construction and operation of the tunnel. It envisaged the establishment of an international commission.

The next stage foreseen by the Foreign Office was that a treaty, preceded by legislation, should be concluded on the basis of the Protocol. On 15 May 1876 the Protocol was submitted to the Law Officers, Sir John Holker A.G., Sir Hardinge Giffard S.G. (later to become the first Earl of Halsbury) and Parker Deane, the Foreign Office consultant on matters of international law. Their reply, dated 18 May 1876, endorsed the steps proposed but made no observations on the Protocol except to point out that no provision had been made for jurisdiction over and punishment of offences before the time the tunnel was in working order.<sup>2</sup> As Holker and Giffard were engaged at this very time in arguing the Crown's case at the first hearing of the Court for Crown Cases Reserved in the appeal of Ferdinand Keyn, it is perhaps not surprising that the report was short.

The means to be used to overcome this deficiency of jurisdiction caused a divergency of views among the British Commissioners. Horace Watson objected to the idea of an agreement to control the works before they had met in the middle of the Channel. In words which suggest that he was the author of Article 5 of the Report already quoted, he wrote on 25 May 1876:

The boring from each shore will, as it progresses, become part of the soil and territory of the country from which it has been driven, if by no previously existing title, at all events by the law of first occupation and possession.<sup>3</sup>

On 12 July 1876, Holker, Giffard and Deane gave a further opinion to the Foreign Office<sup>4</sup> stating that they had not intended in their first report to recommend that an 'international contract' be made, but only that provision should be made in England for offences committed during the progress of the works.

## B. THE EXCAVATIONS

Meanwhile, the Channel Tunnel Bill passed through Parliament and received the Royal assent on 2 August 1875 as the Channel Tunnel Company (Limited) Act 1875.<sup>5</sup> During its Parliamentary progress, the Board of Trade secured the insertion of a clause which became Section 9 of the Act. This read:

Nothing contained in this Act shall authorize the Company to take, use, tunnel under, or in any manner interfere with any portion of the shore or bed of the sea, or of any river, channel, creek, bay, or estuary, or any right in respect thereof belonging to the Queen's Most Excellent Majesty in right of Her Crown, and under the management of the Board of Trade, without the previous consent in writing of the Board of Trade on behalf of Her Majesty (which consent the Board of Trade may give), neither shall anything in this Act contained extend to take away, prejudice, diminish, or alter any of the estates, rights, privileges, powers, or authorities vested in or enjoyed or exerciseable by, the Queen's Majesty, Her heirs and successors.

Under Section 7 of the Act, the powers of land acquisition could not be exercised

<sup>1</sup> Ibid., pp. 151-4 for the full text of the Protocol.

<sup>2</sup> F.O. 881/4028, p. 27. The case of *R. v. Keyn*, (1876) 2 Ex. D. 63, arose out of the collision in the Straits of Dover between the British ship *Strathclyde* and the German ship *Franconia*. For details of the prosecution of the *Franconia's* master, Keyn, see G. Marston, *Law Quarterly Review*, 92 (1976), p. 93.

<sup>3</sup> C. 3358, p. 163.

<sup>4</sup> F.O. 881/4028, p. 28.

<sup>5</sup> Local Acts, 38 & 39 Vict. c. cxc.

after the expiration of one year from the passing of the Act. These powers in fact were never exercised.

Sir Edward Watkin, in charge of the South Eastern Railway Company, was more active. In 1880, the company made some experimental borings which abutted on the foreshore between high- and low-water marks at Abbot's Cliff, near Folkestone. The bores did not run out below low-water mark. In reply to an inquiry from the Board of Trade, the company asserted that exclusive rights over the foreshore at the spot in question were claimed by the local Lord of the Manor to the exclusion of the Crown.<sup>1</sup>

In 1881, the company presented another Bill to Parliament seeking authority to continue works towards the construction of a tunnel under the Channel. The Bill received the Royal assent on 11 August 1881 as the South Eastern Railway Company Act 1881.<sup>2</sup> The Office of Woods and Forests and the Board of Trade succeeded in procuring the insertion of saving clauses under which their permission was required before borings could take place below high-water mark. Under powers given in the Act, the company then purchased from the local Lord of the Manor three miles of foreshore between Folkestone and Dover. The scene was now set for a confrontation. On 14 September 1881 Sir Edward Watkin wrote to Joseph Chamberlain, President of the Board of Trade: 'We are about to make a new start, and I hope before Christmas the boring will be far under the sea.'<sup>3</sup>

In order to promote the scheme, the South Eastern Railway Company formed a new entity, the Submarine Continental Railway Company Limited, with Watkin as Chairman. This enterprise, which was incorporated on 8 December 1881, commenced boring operations at a spot above the foreshore between Folkestone and Dover near the western end of the Shakespeare Cliff railway tunnel.<sup>4</sup> The Board of Trade was not slow in reacting. In a letter addressed to Watkin on 13 January 1882, it warned:

The Board of Trade desire me to point out to you that their sanction has never been applied for or given to these experimental works which are being made through tidal lands *prima facie* the property of the Crown.<sup>5</sup>

In another letter, dated 6 March 1882, it informed Watkin:

. . . the foreshore of the United Kingdom, below high-water mark, are [*sic*] *prima facie* the property of the Crown, and under the management of the Board of Trade who in the absence of any information or legal evidence to the contrary, are unable to admit that the Crown has parted with any rights or interests in the foreshore through which the works are being made.<sup>6</sup>

It is clear that the Government was not confining its objections to works carried out between high- and low-water marks for on 30 March 1882, in reply to a question in the House of Commons, Chamberlain stated bluntly: '. . . the Government claim the bed of the sea below low-water mark and for three miles beyond . . .'<sup>7</sup>

The Government departments were also clear in stating the Crown's claim to seabed and subsoil below low-water mark. On 6 March 1882 the Postmaster-General, in a letter addressed to the Treasury, wrote:

<sup>1</sup> C. 3358, p. 307.

<sup>2</sup> Local Acts, 44 & 45 Vict. c. cxcv.

<sup>3</sup> C. 3358, p. 319.

<sup>4</sup> The author recently visited the site. Some rusty narrow-gauge sidings and the cement foundations of the shaft-head buildings still remain although the shaft itself appears to have been filled in many years ago. For contemporary photographs and plans of the operation, see, e.g. A. S. Travis, *Channel Tunnel 1802-1967* (1967). Similar excavations were commenced near Boulogne at the same time.

<sup>5</sup> C. 3358, p. 324.

<sup>7</sup> *Hansard's Parliamentary Debates*, Third Series, vol. 268, col. 308.

<sup>6</sup> *Ibid.*, p. 327.



The Telegraph Act 1878 gives to this department a right of way for its telegraphs over works of the kind executed within the limits of this country in pursuance of any special Act of Parliament passed after the 1st of January of that year, so that the Post Office would be entitled to such right in respect of the approaches to the tunnel, and probably to a point three miles distant from low-water mark.<sup>1</sup>

On 1 April 1882 Farrer expressed the opinion of the Board of Trade in a further letter addressed to Watkin:

Whatever might be the title to the foreshore, there is no doubt as to the title of the Crown to the bed of the sea beyond low-water mark, and within the territorial limits of the United Kingdom.<sup>2</sup>

### C. THE LITIGATION

Relations between Watkin and the Board of Trade now deteriorated rapidly. On 26 June 1882 the Board wrote to Watkin:

The Board of Trade desire to make an immediate inspection of the works of the Company, in order to satisfy themselves that these works have not been carried below low-water mark, and into the three mile limit, the soil of which is claimed by the Crown. . . . [T]he President has decided to consult the Law Officers with regard to the steps to be taken to protect the rights of the Crown.<sup>3</sup>

#### (i) *The injunction*

The exact nature of the consultations does not appear from the papers found, but official steps were rapidly taken. On 28 June 1882 a writ was issued and on 5 July 1882 the Attorney-General, Sir Henry James, instructed by the Board of Trade, appeared before Kay J. in the Chancery Division of the High Court to apply for an interim injunction against the South Eastern Railway Company and the Submarine Continental Railway Company to restrain them from proceeding with the boring, which by this time had been driven more than 600 yards beyond low-water mark in the direction of the Admiralty Pier at Dover.

The writ sought an injunction against the defendants to restrain them from boring or tunnelling into, excavating, or in any manner interfering with the bed of the sea below ordinary low-water mark and from taking, using or interfering with any soil or substance in, from or out of such bed of the sea and from continuing in possession of any works or excavations in or under such bed of the sea and from further proceeding with experimental borings or other works in connection with the construction of the tunnel. The writ also asked the Court to declare the right and title of the Crown to, in and over the soil and bed of the sea under which the borings extended. Finally, the writ sought inspection of the works.<sup>4</sup>

On the point of the interim injunction, Kay J. was addressed by the Attorney-General on behalf of the Crown and by Judah Benjamin Q.C. on behalf of the South Eastern Railway Company. The latter must have recalled vividly his successful appearance against the preceding Law Officers six years previously in *R. v. Keyn* and, perhaps, that part of the argument before the Court for Crown Cases Reserved on 23 June 1876 when the very point presently at issue was canvassed hypothetically.<sup>5</sup>

The Attorney-General was reported to have stated before Kay J.:

. . . in respect to the foreshore, while the rights of the Crown would be supposed to exist as owners, yet the Crown might have given property in it to others. It might be that

<sup>1</sup> C. 3358, p. 329.

<sup>2</sup> *Ibid.*, p. 331.

<sup>3</sup> *Ibid.*, p. 352.

<sup>4</sup> Cause No. A. 1045 of 1882.

<sup>5</sup> See D.P.P. 4/13 (Transcript 23 June 1876, pp. 141-4).

the South Eastern Company could have shown such a property, though they have not shown it, and we do not know whether they have any property in the foreshore. It was possible that they might have been able to show a grant actually in existence, or rights amounting to a grant, entitling them to access through the foreshore, but directly their works passed low-water mark and were under the bed of the sea, or the soil forming the bed of the sea, the rights of the Crown in the soil forming the bed of the sea would be at once affected. . . .<sup>1</sup>

Benjamin Q.C. was reported to have replied:

But what was now asserted was that the Crown was the owner of the bed of the sea below water mark; and so far as the question of property in the Crown was concerned the company was advised that they could successfully contest the right. Whether or not the Crown owned the bed of the sea or whether, according to the principles of international law, the bed of the sea below low water mark was the property of the first occupant, and stood unappropriated to be taken possession of by mankind at large was a matter upon which authorities had differed. The South Eastern Company desired to say that, in the arrangement to which they had consented, they reserved to themselves all their rights upon these points which would be contested in the progress of the cause, but at the same time they would not deny that there were such *prima facie* rights on the part of the Crown in the bed of the sea as had been asserted by various dicta, and therefore in agreeing that the question should be decided at a later period, they were willing that in the meantime those rights should be respected.<sup>2</sup>

Kay J. thereupon granted an interim injunction in the form of an Order restraining the defendants from proceeding with the operations 'beyond ordinary low-water mark without the consent of the Board of Trade' and also granting inspection.<sup>3</sup>

Further proceedings took place a few weeks later when, on 16 August 1882, the Crown applied to the Vacation Judge, North J., for a commission of sequestration to issue against the personal estate and rents and profits of the defendant companies for disobedience of the Order of Kay J. It was admitted that the works had been carried for a further 36 yards. On the defendants' giving an undertaking not to use the boring machine for any purpose whatsoever, unless with the written consent of the Board of Trade, the motion was adjourned *sine die*. On behalf of the Submarine Continental Railway Company, Littler Q.C. was reported to have stated in court:

The company had purchased the foreshore, and with respect of any rights of the Crown to interfere with any extension beyond the foreshore, there was obviously since the decision in the *Franconia* case a question for argument at the trial.<sup>4</sup>

The Crown's Statement of Claim<sup>5</sup> in respect of the merits of the principal cause was delivered meanwhile on 9 August 1882. The first paragraph ran as follows:

The bed of the sea adjacent to the coasts of England below ordinary low-water mark (as well as the foreshore between ordinary high and ordinary low-water mark) belongs to and is vested in Her Majesty Her Heirs and Successors in right of Her Crown as a territorial possession [(except so far as Her Majesty or any of Her predecessors has been pleased to grant limited parts thereof to any person)] and Her Majesty has also by Her royal prerogative the absolute right and power over the same for the purpose of defending the kingdom and coasts from waste incursions of the sea invasion of enemies and other interference.

<sup>1</sup> *Daily News*, 6 July 1882.

<sup>3</sup> See C. 3358, pp. 353-4 for the text of this Order.

<sup>4</sup> *The Times*, 17 August 1882.

<sup>5</sup> CREST 37/584. The amendment in square brackets was added on 16 June 1883.

<sup>2</sup> *Ibid.*

Paragraph 17 of the same Statement read:

The acts of the Defendant Companies in making and continuing the aforesaid tunnel and works under the bed of the sea constitute a purpresture and encroachment on the soil and freehold of Her Majesty and an infringement of both the territorial and the prerogative rights of the Crown. Such acts affect the national security and no licence or consent by or on behalf of the Crown to make or continue any such works has been given and no determination has been arrived at with reference to the construction of a tunnel under the English Channel either by Her Majesty's Government or by Parliament.

The Crown also included the request 'that so far as necessary the right and title of Her Majesty to in and over the soil and bed of the sea under which the works commenced by the Defendants extend may be declared'.

The Submarine Continental Railway Company did not deliver its Statement of Defence until 17 May 1883.<sup>1</sup> Its first paragraph ran:

These Defendants do not admit that the bed of the sea adjacent to the coast of England below ordinary low water mark belongs to or is vested in Her Majesty her heirs and successors in right of her crown as a territorial possession or otherwise or that Her Majesty has the absolute right and power over the same by her royal prerogative or otherwise for the purpose of defending the kingdom or coasts from waste incursions of the sea invasions of enemies and other interference.

Paragraph 26 of the Statement of Defence expanded the above argument:

These Defendants deny that the acts of either of the Defendant Companies in making and continuing the experimental tunnel and works under the bed of the sea constitute any purpresture or encroachment on the soil or freehold of Her Majesty or an infringement either of the territorial or the prerogative rights of the Crown the bed of the sea below low-water being (as they submit) unappropriated and no part of the realm or vested in or belonging to Her Majesty or any department of Her Majesty's Government. These Defendants deny that the construction of a permanent tunnel would in any way affect the national security and they deny that any such question is involved in this action.

The Statement of Defence on behalf of the South Eastern Railway Company was also delivered on 17 May 1883.<sup>2</sup> It was drafted differently from that delivered on behalf of the other defendant. Paragraph 1 read:

These Defendants do not admit that the bed of the sea adjacent to the coasts of England below ordinary low water-mark belongs to or is vested in Her Majesty her heirs or successors in right of her Crown as a territorial possession or that Her Majesty has by her royal prerogative or otherwise without the action of Parliament any absolute right or power over the same for the purpose of defending the kingdom or coasts from waste incursions of the sea invasions of enemies or other interference but if any such right exists they submit that it is not applicable or exercisable under the circumstances of the present case.

The final paragraph of the Statement of Defence, paragraph 21, expanded the above argument:

These Defendants submit that the making and continuing the aforesaid experimental tunnel and works under the bed of the sea do not constitute any purpresture or encroachment on the soil or freehold of Her Majesty the bed of the sea below low water-mark being (as they submit) unappropriated and not part of the realm and they submit that

<sup>1</sup> Ibid.; it was delivered by Messrs. Fowler and Perks, Solicitors.

<sup>2</sup> Ibid.; it was delivered by William Richard Stevens, Solicitor.



such acts are not any infringement of the territorial or prerogative rights of the Crown. They do not admit or believe that the construction of a permanent tunnel would affect the national security but they deny that any such question is involved in this action . . .

Both defendants also relied on the various local Acts of Parliament passed since 1874 as providing authority for them to carry on the experimental works.

On 16 June 1883, the Crown delivered an amended Statement of Claim.<sup>1</sup> The main amendment, apart from the addition to the first paragraph of a clause indicated above in square brackets, was the insertion of a new paragraph 1a which ran as follows:

In the years 1859 and 1861 the Defendants the South Eastern Railway Company purchased from the Crown certain portions of the bed of the sea of limited extent at Dover and at Folkestone but no grant has been made by the Crown of that part of the bed of the sea under which the works now commenced by the Defendants extend.

In practice, this was the end of the affair. On 5 April 1883, a Joint Select Committee of both Houses of Parliament was appointed to inquire whether it was expedient that Parliamentary sanction be given to the tunnel scheme. This Committee reported on 10 July 1883, concluding by a majority that such a step was not expedient. The report,<sup>2</sup> though voluminous, contained no discussion of the legal problem. As a consequence of this report, the defendants abstained from delivering an amended Statement of Defence. The cause never reached the stage of a hearing.

## (ii) *The information*

The writ seeking an injunction was not the only legal step taken by the Crown against the two companies. On 5 December 1882 the Attorney-General filed an information in the Queen's Bench Division against the two companies and their secretary, John Shaw.<sup>3</sup> The information, in addition to requesting a declaration of the Crown's title to the foreshore, asked that the work under the foreshore be restrained and all encroachments and works carried out in or upon it be abated and filled up. It also sought inspection of the works. The first paragraph of the information was drafted as follows:

The foreshore of the sea between high-water mark and low-water mark around the coasts of this kingdom, including the coast of the county of Kent, and the foreshore between high-water mark and low-water mark of all estuaries and arms of the sea and creeks running into the said county, as also the bed of the sea around the coast of the said county, and the bed of the said estuaries, arms, and creeks have been from time immemorial vested in the Kings and Queens of England in right of their Crown in their demesne as of fee, and are now vested in Her Majesty in right of Her Crown in Her demesne as of fee, except in so far as Her Majesty or Her Royal Predecessors Kings and Queens of England has or have been pleased to grant parts thereof to any person or persons, or corporation or corporations, but no grant has ever been made to the Defendants, or either of them, or to any predecessor in title of them, or either of them, of that part of the foreshore of the sea on the coast of Kent under which the works of the Defendant Companies have been carried on and which is the subject of this information.

The defendants entered an appearance to the information, but, although the preliminary proceedings continued spasmodically until well into the next decade, the cause never proceeded to the stage of a hearing.

<sup>1</sup> CREST 37/584. See above, p. 296 n. 5.

<sup>2</sup> *House of Commons Sessional Papers*, 1883, (248), vol. XII.

<sup>3</sup> CREST 37/584.

## D. THE ACADEMIC REACTION

Although Joseph Chamberlain stated in the House of Commons on 14 May 1884 that '... nobody disputed the right of the Crown to the solum of the sea within the three-mile limit',<sup>1</sup> the legal proceedings described above led to contrary views being expressed by some writers of the time. These writers considered that the point at issue had already been decided against the Crown by the case of *Keyn*. Thus H. J. W. Coulson, writing in August 1882, declared:

The practical effect of this decision . . . is that the absolute dominion and property of the realm of England ceases at low water mark, except in cases where portions of the soil of the sea have been physically and permanently occupied, as by forts, breakwaters, and the like.<sup>2</sup>

Coulson considered that the Territorial Waters Jurisdiction Act 1878 had not 'in any way [affected] the rights as to the ownership of the soil of the shore below low water'.<sup>3</sup>

Sir Sherston Baker, writing in May 1883 of the 'territory' reclaimed by tunnelling below low-water mark, similarly remarked:

. . . it is now admitted on all hands that it is out of the Realm. The Common Law does not run there, the Statute Law does not run there, the Royal Prerogative does not obtain there. It is a 'no man's land', a *terra incognita*, an unappropriated land.<sup>4</sup>

A difference of opinion arose between the above authors, however, over the question whether the Crown could by its prerogative prevent a tunnel commenced in France from reaching the shores of England. Coulson thought that under its 'inherent prerogative' for the defence of the realm the Crown could 'prohibit absolutely the construction of any works either above or below ground, at least within the limit of three miles of the coast, without incurring any charge of violating the Law of Nature or of Nations'.<sup>5</sup> Whether such activity would violate English municipal law was a question which Coulson appears to have avoided, although elsewhere in his article he stated that the 'jurisdiction of the British Crown' extended beyond the low-water mark for certain purposes.<sup>6</sup> Sherston Baker, on the other hand, argued in the same journal, nine months later, that the Crown could not exercise its prerogative over 'adjoining waste lands not part of the domain' and could not change any part of the common law or statute law or the 'customs of the realm'. Nor, he asserted, could the Crown create any offence which was not an offence before nor could the Crown be the sole judge of danger to the realm in time of peace.<sup>7</sup> Three days after the hearing before Kay J., the editorial writer of the *Law Journal* also expressed doubts about the strength of the Crown's case, which he described as 'far from impregnable'. He suggested that an Act of Parliament might be passed in preference to relying on a 'doubtful prerogative'.<sup>8</sup>

<sup>1</sup> *Hansard's Parliamentary Debates*, Third Series, vol. 288, col. 321.

<sup>2</sup> H. J. W. Coulson, 'The Channel Tunnel from the Point of View of International Law', *Law Magazine & Review (Fourth Series)*, 7 (1882), p. 353, at pp. 361-2. Coulson was the joint editor of *Coulson & Forbes on the Law of Waters and Land Drainage*, the first edition of which had been published in 1880.

<sup>3</sup> *Ibid.*, p. 362.

<sup>4</sup> Sir Sherston Baker, 'An Argument for the Channel Tunnel', *Law Magazine & Review (Fourth Series)*, 8 (1883), p. 259 at p. 262.

<sup>5</sup> Coulson, *op. cit.* (above, n. 2), p. 366.

<sup>6</sup> *Ibid.*, p. 365.

<sup>7</sup> Baker, *op. cit.* (above, n. 4), pp. 265-9.

<sup>8</sup> *Law Journal*, vol. 17, p. 359.

## E. CONCLUSION

In at least two respects the events described above have been overtaken by subsequent developments in international law. First, it is now established beyond doubt that both by virtue of Article 2 of the Convention on the Territorial Sea and the Contiguous Zone, 1958<sup>1</sup> and under customary international law the sovereignty of a coastal State extends to the bed and subsoil of its territorial sea. A century ago this point was not so clear.<sup>2</sup> Secondly, the legal concept of continental shelf extending beyond the territorial sea was as such unknown during the course of the events described above. Today, the submerged lands through which a Channel tunnel would be constructed are regarded as continental shelf to the extent that they are outside the territorial seas of the United Kingdom and France.<sup>3</sup> In a third respect, the events of last century reflect a doctrinal problem which is still largely unresolved, namely the international legal status of the bed and subsoil of the high seas. The Foreign Office view, based in part upon the 1875 report of the British members of the Joint Commission, came to regard such areas as *res nullius*, capable of being acquired by effective possession like any other *res nullius*.<sup>4</sup>

The municipal law question raised in the above account is still controversial. Despite the Crown's assertion of property rights in the submerged lands below low-water mark and its consistent practice of requiring those wishing to make use of the area for any purpose to apply to it for leases or grants, the view of Coulson has not gone unheeded. In 1967, the Supreme Court of Canada followed the view expressed in *Coulson & Forbes on the Law of Waters and Land Drainage* to the effect that the realm of England extends only to low-water mark on the coast facing the open sea and that the legislature alone is empowered to make any area beyond the low-water mark liable to the common law or to vest the soil of the bed in the Crown.<sup>5</sup> Similar though not so sweeping views have been put forward by the Supreme Court of the United States<sup>6</sup> and by the High Court of Australia.<sup>7</sup> If the litigation over the Channel Tunnel scheme had gone to a full hearing, some of the problems now being experienced in common law countries around the world in respect of the municipal law status of maritime areas could well have been settled once and for all a century ago.

<sup>1</sup> *United Nations Treaty Series*, vol. 516, p. 205.

<sup>2</sup> See *R. v. Keyn*, (1876) 2 Ex. D. 63.

<sup>3</sup> Although Article 7 of the Convention on the Continental Shelf, 1958, preserves 'the right of the coastal State to exploit the subsoil by means of tunnelling irrespective of the depth of water above the subsoil'.

<sup>4</sup> The papers leading to the Anglo-Venezuelan treaty regarding the submarine area of the Gulf of Paria in 1942 indicate this.

<sup>5</sup> *Re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792, 807.

<sup>6</sup> e.g. *United States v. Maine et al.*, (1975) 420 U.S. 515.

<sup>7</sup> *State of New South Wales et al. v. Commonwealth of Australia*, (1975) 8 A.L.R. 1.



# THE WORLD BANK AND INSURANCE\*

By THEODOR MERON<sup>1</sup>

## INTRODUCTION

The International Bank for Reconstruction and Development, or the World Bank, as it is commonly called, a specialized agency of the United Nations, is—together with the institutions associated with it: the International Development Association (I.D.A.) and the International Finance Corporation (I.F.C.)—the principal multilateral, inter-governmental financial organization of the international community. As such it has played and it continues to play a vital role in facilitating the flow of development financing from the developed to the developing countries.

In the first place, the Bank has performed the function of banker and lender. Both by borrowing money on the various capital markets of the world and by using governmental funds, the World Bank has mobilized billions of dollars which it has lent to the developing nations. Nevertheless, these loans, even taken together with funds made available bilaterally, Government to Government, have hardly sufficed to satiate the tremendous hunger for development assistance; hence the need for the large-scale flow of private capital directly from the developed to the developing nations, 'whether as debt or equity, and whether the projects are wholly or partially owned by the private foreign investor'.<sup>2</sup>

The Bank has, therefore, acted also as catalyst for the development of ideas, institutions and procedures to facilitate the flow of private investment capital to the developing countries. Realizing that the fear of political, non-commercial risks is an important deterrent to such a flow, the Bank 'considered it appropriate to explore whether it could make a contribution to an improvement in the investment climate, by reducing the likelihood of unresolved conflicts between host countries and investors, and in particular by doing so in a manner which would eliminate the risk of a confrontation of the host country and the national State of the investor'.<sup>3</sup>

These broad objectives of the Bank will be examined in this note in relation to problems of insurance: first, briefly, insurance in the primary lending functions of the Bank (although lending insurance goes beyond the scope of this study); secondly, the relationship between insurance and the operation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States; and finally in the context of the elaboration by the Bank of the imaginative but unfortunately abortive project relating to the establishment, under its aegis, of an International Investment Insurance Agency.

## INSURANCE IN THE LENDING ACTIVITIES OF THE BANK

The Bank, as a lending institution, has an obvious interest in the completion and success of the projects for which it lends its scarce resources. Hence its interest in the

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<sup>2</sup> Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States', *Recueil des cours*, 136 (1972-II), p. 337 at p. 343.

<sup>3</sup> *Ibid.*, at p. 343.

proper insurance of imported goods financed from the proceeds of the loans, and, where appropriate, in the insurance of the projects or the entities carrying out the agreed projects. While important, these are relatively simple matters.

The Bank negotiates agreements with Governments on the basis of the Bank's Standard Insurance Covenants. Regarding the use of goods, the relevant covenant is contained in section 3.04 (a), which reads as follows:

The Borrower undertakes to insure, or make adequate provision for the insurance of, the imported goods to be financed out of the proceeds of the Loan against hazards incident to the acquisition, transportation and delivery thereof to the place of use or installation, and for such insurance any indemnity shall be payable in a currency freely usable by the Borrower to replace or repair such goods.<sup>1</sup>

The insistence of the Bank on the indemnity being payable in currency freely usable to replace or repair the imported goods is understandable. Insurance payable in local non-convertible currency would hardly be meaningful where the project is dependent on goods which can only be obtained abroad, usually only in certain developed countries. To illustrate the practice with respect to the covenant contained in section 3.04 (a), it may be useful to recall a recent Loan Agreement (Education Project) concluded on 9 January 1974 between the Bank and the Republic of Honduras.<sup>2</sup> Section 3.04 (a) of this Agreement reads as follows:

The Borrower undertakes to, and shall cause INFOP in respect of Part D of the Project to, insure, or make adequate provision for the insurance of, the imported goods to be financed out of the proceeds of the Loan against hazards incident to the acquisition, transportation and delivery thereof to the place of use or installation, and for such insurance any indemnity shall be payable in a currency freely usable by the Borrower to replace or repair such goods.

It should be explained that INFOP was defined as the National Institute for Professional Training, established by Decree Law No. 10 of the Borrower, and Part D of the Project concerned the construction, furnishing and equipping of two vocational training centres and one industrial training development centre, all to be operated by INFOP. The international obligation was of course undertaken by the Republic of Honduras *vis-à-vis* the Bank (an intergovernmental, multilateral organization), and the Republic was responsible for appropriate insurance arrangements being made by INFOP, the Honduras institution charged with the operation of the project.

The Bank's Standard Insurance Covenants contain also a covenant (section 4.03) pertaining to general insurance. It reads as follows:

The Borrower shall cause \* to take out and maintain with responsible insurers, [or to make other provision satisfactory to the Bank for,] insurance against such risks and in such amounts as shall be consistent with appropriate practice.<sup>3</sup>

In the above-mentioned Honduran Loan Agreement, section 4.03 (a) provides that

The Borrower shall cause INFOP to take out and maintain with responsible insurers insurance against such risks and in such amounts as shall be consistent with appropriate practice.

It should, however, be observed that section 4.03 is often omitted in loans to Governments because of the nature of the project, e.g. education, highways, etc.

<sup>1</sup> LM Standard, D-24, 15 March 1974.

<sup>2</sup> Loan No. 954 HO.  
<sup>3</sup> LM Standard, E-5, 15 March 1974. The asterisk indicates name of the entity carrying out the project, when there is no project agreement.

## INSURANCE AND THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

The Convention on the Settlement of Investment Disputes between States and Nationals of other States<sup>1</sup> (hereinafter referred to as the Convention) and, of course, I.C.S.I.D. (International Centre for Settlement of Investment Disputes), within which the Convention is administered, grew out of one of the most felicitous initiatives of the Bank.<sup>2</sup> The relationship with the Bank has contributed to I.C.S.I.D.'s reputable standing, as is evidenced by the impressive number of States that have become parties to the Convention.<sup>3</sup>

The Convention is an important innovation in both the law of international claims and the law of peaceful settlement of international disputes in that it creates facilities for settlement of investment disputes through conciliation or arbitration 'to which the host country and the foreign investors would be parties on an equal procedural footing, without either requiring or permitting the intervention of the investor's national State'.<sup>4</sup>

In the confines of the present study it is not proposed to comment in detail on the Convention, except in so far as may be necessary for a discussion of questions of insurance.

The most important article of the Convention is Article 25, which delimits the jurisdiction of the Centre. It reads as follows:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) 'National of another Contracting State' means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to

<sup>1</sup> Done at Washington on 18 March 1965. Text in *United Nations Treaty Series*, vol. 575, p. 159; *United States Treaty Series*, vol. 17, p. 1270; *Treaties and Other International Acts Series*, p. 6090.

<sup>2</sup> See, in general, Broches, loc. cit. (above, p. 301 n. 2) and the bibliography, *ibid.*, at pp. 406-10. See also *Senate Executive Reports*, No. 2, 89th Congress, 2d Session (1966). See also Fatouros, 'Investissements étrangers et arbitrage entre États et personnes privées—la Convention B.I.R.D. du 18 mars 1965', *Revue critique de droit international privé*, 49 (1970), p. 580.

<sup>3</sup> The following 66 States were parties to the Convention on 1 April 1975: Afghanistan, Austria, Belgium, Botswana, Burundi, Cameroon, Central African Republic, Chad, China, Congo (Brazzaville), Cyprus, Dahomey, Denmark, Egypt, Finland, France, Gabon, Gambia, Federal Republic of Germany (applicable to Land Berlin), Ghana, Greece, Guinea, Guyana, Iceland, Indonesia, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kenya, Korea, Lesotho, Liberia, Luxembourg, Malagasy Republic, Malawi, Malaysia, Mauritania, Mauritius, Morocco, Nepal, Netherlands, Niger, Nigeria, Norway, Pakistan, Senegal, Sierra Leone, Singapore, Somalia, Sri Lanka, Sudan, Swaziland, Sweden, Switzerland, Togo, Trinidad and Tobago, Tunisia, Uganda, United Kingdom (excluding British Indian Ocean territory, Brunei, Jersey, Isle of Man, New Hebrides, Pitcairn Islands, British Antarctic Territory, Southern Rhodesia, and Sovereign Base Areas of Cyprus), United States, Upper Volta, Yugoslavia, Zaire, Zambia.

<sup>4</sup> Broches, loc. cit. (above, p. 301 n. 2), at p. 344.



conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

*Ratione personae* the jurisdiction of the Centre is limited to legal disputes between a contracting State (or any of its constituent subdivisions or agencies designated to the Centre by that State) and a person having the nationality of another contracting State. Disputes between two contracting States, or between nationals of two contracting States, or between the contracting State and an international organization, or between a contracting State and its nationals, are excluded. In other words, the jurisdiction embraces exclusively legal disputes arising between a foreign investor and the host State, directly out of an investment.

Broches observes, on the basis of the negotiating history of the Convention, that despite the fact that the first preambular clause of the Convention speaks of 'private international investment' a national (a juridical person) of another Contracting State need not be a privately owned entity, and that mixed economy companies or even government-owned corporations should not be disqualified unless acting as an agent for the Government or discharging an essentially governmental function.<sup>1</sup> In other words the investment need not necessarily be entirely 'private'.

As regards jurisdiction *ratione materiae* of the Centre, the following observations may be relevant. First, the Convention does not define the term 'investment' (nor does it define the term 'legal disputes'). According to a memorandum submitted to the Senate by the Treasury Department, the term 'investment' did not exclude a short-term investment. Relying on the negotiating history of the Convention, the Treasury Department pointed out that the term could include a loan by a foreign private investor of one country to the Government of another country, or a transfer to a new or existing enterprise in a host country of loan or equity capital, industrial property rights or services.<sup>2</sup> It has already been observed that the investment need not be entirely 'private'. Secondly, the term 'legal dispute arising directly out of an investment' was used 'only to make clear that ordinary commercial disputes are not intended to be covered'.<sup>3</sup>

Two further preliminary comments may be called for. According to Article 26 of the Convention, consent of the parties to arbitration 'shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy'. This is the general principle, but the Article goes on to say, with respect to local remedies, that a Contracting State 'may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention' (as a term

<sup>1</sup> Loc. cit. (above, p. 301 n. 2), at pp. 354-5. See also Broches in *Investissements étrangers et Arbitrage entre États et personnes privées, la convention B.I.R.D. du 18 mars 1965*, Centre de Recherches sur le Droit des Marchées (1969), pp. 170-1.

<sup>2</sup> *Senate Executive Reports*, No. 2, 89th Congress, 2d Session (1966), at p. 2.

<sup>3</sup> Statement by Leonard C. Meeker, Legal Adviser to the Department of State, *ibid.*, at p. 30.

of the agreement to arbitrate, or under a reservation to the Convention).<sup>1</sup> Secondly, Article 27 of the Convention provides that

(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

Thus, States that have agreed to submit a dispute to arbitration under the Convention, have the assurance that the national States of the investors would not have the right to extend to their nationals the right of diplomatic protection (as defined in the second paragraph) with respect to such a dispute. Broches observes that the purpose of this provision was to 'assure a host State which has agreed to the jurisdiction of the Centre that it will not be exposed in the alternative, or cumulatively, to an international claim put forward by the investor's national State in the exercise of diplomatic protection'.<sup>2</sup> The only exception to this renunciation by the Contracting States of their traditional right to exercise diplomatic protection, is when the host State fails to abide by and comply with the arbitral award, in which case the right becomes operative again.<sup>3</sup>

After these general observations, it is proposed to consider the operation of the arbitration clauses under the Convention in the case of the investor who, having carried political-risk insurance, suffered a loss as a result of an action by the host State covered by the insurance, presented a claim against the insurer, and was indemnified by the latter. Let us further assume that the insurer was subrogated to the rights and claims of the insured investor. Can the insurer benefit from the arbitration clause and bring proceedings against the host State?

If the insurer is a private entity and is a national of another Contracting State, nothing in the Convention, and especially in Article 25 thereof, would adversely affect the operation of the arbitration. Broches points out that the Convention is silent 'as to the assignability of I.C.S.I.D. arbitration agreements and there is no reason to

<sup>1</sup> Schwebel and Wetter, 'Arbitration and the Exhaustion of Local Remedies', *American Journal of International Law*, 60 (1966), p. 484 at p. 485.

<sup>2</sup> Loc. cit. (above, p. 301 n. 2), at p. 356.

<sup>3</sup> Broches discusses the question of a possible conflict between the settlement of disputes procedures under the Convention on the one hand and, under a bilateral agreement between the host State and the national State of the investor with respect to treatment of foreign investment, which contains a dispute settlement clause, on the other, loc. cit. (above, p. 301 n. 2), at pp. 376-8. In the course of the hearings before the Senate Committee on Foreign Relations, Senator Aiken asked Leonard C. Meeker, Legal Adviser to the Department of State, what the effect of the Convention would be in relation to guaranteed loans in foreign countries. Mr. Meeker replied as follows: 'This is supplementary to the investment guarantee programme. The investment guarantee programme is a relationship between the U.S. Government and the investor it wishes to encourage and to whom it provides insurance. Now, this convention relates to another relationship, and that is the relationship between the private investor and the foreign government, and it affords a means of their settling their difference by arbitration.' *Senate Executive Reports*, No. 2, 89th Congress, 2d Session (1966), at p. 20.

Actually, three sets of relationship should be taken into account: the relationship between the investor and his national Government under the insurance programme, the relationship between the investor and the host country in the context of I.C.S.I.D., and the relationship between the host Government and the national Government of the investor as defined in a bilateral agreement with respect to investments, where such an agreement has been concluded.



consider that assignment is not permitted',<sup>1</sup> as long as the assignee or successor has the status required by the Convention. Broches adds that if the insurer is a private entity and a national of another contracting State, 'it could avail itself of the I.C.S.I.D. arbitration clause as subrogee if that clause had been declared applicable to such a successor in interest'.<sup>2</sup>

While the jurisdiction of the Centre as determined by the Convention would not be affected in such a case, other problems might arise in relation to the consensual element of the jurisdiction as laid down in the arbitral (compromissory) clause. Must the successor, assignee, or subrogee consent in writing to the jurisdiction, or is it enough that the original investor, party to the agreement, had agreed to the arbitration? Such a new agreement is probably not necessary, but the Staff of I.C.S.I.D. suggests that, in order to avoid difficulties, this question should be explicitly resolved in the arbitration agreement:

While Article 25 (1) of the Convention appears to require that the consent of each party relate specifically only to the dispute itself and not necessarily to the identity of the other party, it would seem advisable to provide explicitly, should there be any possibility of the identity of one or both parties changing during the term of the agreement, that the settlement of disputes provision applies also to successors in interest. This would assure that:

- (a) the successor is bound to the same extent as his predecessor; and, by necessary reciprocity,
- (b) that the other party continues to remain bound.<sup>3</sup>

Another advantage of such a method would be that it could preclude any transfers of interest that would destroy the jurisdiction of the Centre, i.e. where a particular successor would be a national of a host State, or of a non-contracting State, and thus would not qualify as a party to the proceedings before the Centre. With these considerations in mind, the Staff drafted the following model clause:

VII. It is hereby agreed, that the consent to the jurisdiction of the Centre expressed in *citation of basic clause above* shall equally bind any successor [in interest] to the *name of constituent subdivision or agency* and to the Investor to the extent that the Centre can assume jurisdiction over a dispute between such successor and the other party [and that neither party to this agreement shall, without the written consent of the other, transfer its interest in this agreement to a successor with respect to whom the Centre could not exercise such jurisdiction].<sup>4</sup>

More difficult questions arise where the insurer is an agency or an institution of the State. A State could not, under Article 25 of the Convention, be party to the arbitral proceedings, even when appearing as subrogee. Thus, even where the host State does not object on political or legal grounds to the subrogation of a State to the claims of the insured investor, the subrogated State could not avail itself of the agreement to arbitrate, because of the explicit and strict jurisdictional limits laid down in the Convention. Broches, discussing the negotiating history of the Convention, recalls that attempts were made to provide for the possibility of a State as subrogee being eligible to be party to I.C.S.I.D. arbitral proceedings, but such attempts were abandoned after

<sup>1</sup> 'Arbitration clauses and Institutional Arbitration, ICSID: A Special Case' in *Commercial Arbitration, Essays in memoriam Eugenio Minoli* (1974), p. 77.

<sup>2</sup> *Ibid.*, at p. 78.

<sup>3</sup> *ICSID, Model Clauses Recording Consent to the Jurisdiction of the International Centre for Settlement of Investment Disputes*, Centre document ICSID/5 (undated), at p. 9.

<sup>4</sup> *Ibid.*, at pp. 9-10.



it became clear that a number of developing countries vigorously opposed such provisions, claiming that they would give the subrogated State the option of either proceeding before the Centre or—despite the prohibition in Article 27—taking the claim up through diplomatic channels, that a State appearing before the Centre as claimant-subrogee would nevertheless be in a more advantageous position than the insured investor, and that through subrogation a dispute between an investor and a host State would be transformed into an inter-State dispute.<sup>1</sup>

Of course, between the clear case of a 'private' insurer on the one hand, qualifying as a party before an I.C.S.I.D. arbitration and an organ of the State (such as the British Export Credits Guarantee Department)<sup>2</sup>, which is obviously disqualified on the other, there exists a broad spectrum of mixed public-private institutions, with different types of charter and organization. Broches suggests that financial interest of a State in the insurance organization should not disqualify the latter from being a party to an I.C.S.I.D. arbitration.<sup>3</sup> According to him the guiding criterion should be 'the juridical organization' of the insurer: if it is organized so as to be independent of the State, as a separate legal personality, in the way in which private entities are organized, it should qualify as a party, except where the relations between the State and the insurer are such that the latter is in effect dependent on the former.

In practice, it may not always be easy to determine the character of an insurance institution for the purposes of Article 25 of the Convention. This would be a matter for the arbitral tribunal to decide, in case of doubt.

If the subrogated State, or an organ of that State, cannot appear as such, can the investor proceed before the Centre against the host country, despite the fact that he has already been indemnified by the insurer, in order to reimburse the insurer out of the eventual recovery from the host Government? Broches suggests that if the insurance contract requires the insured so to act, 'such an action by the investor might fail if the host State argued that the investor, having been compensated, was not the real party in interest and lacked *locus standi* for that reason'.<sup>4</sup> Elsewhere, Broches points out that in such a situation, difficulties arise in terms of the qualification of the rule 'point d'intérêt, point d'action', or 'the real party in interest' rule, as procedural or as substantive in terms of Article 42 of the Convention, and also as regards the choice of the applicable law.<sup>5</sup> One can, however, wonder, at least in so far as common law is concerned, whether Broches' assumption that the insured cannot proceed with a subrogation suit in his own name on the ground that he is no longer the real party in interest is not debatable?<sup>6</sup>

<sup>1</sup> 'La convention et l'Assurance-investissements, le problème dit de la Subrogation' in *Investissements étrangers et Arbitrage entre États et personnes privées*, above, p. 304 n. 1, at pp. 163-6.

<sup>2</sup> Under the Overseas Investment and Export Guarantees Act, 1972.

<sup>3</sup> A body such as the United States Overseas Private Investment Corporation, an agency of the United States Government (under the policy guidance of the Secretary of State) to stimulate private investment in developing countries through guarantees of American investors, created under the Foreign Assistance Act of 1969, would be clearly ineligible as a party. It would seem that Crown Corporations such as the Canadian Export Development Corporation would be ineligible as parties to I.C.S.I.D. arbitrations. See, in general, Broches, loc. cit. (above, p. 304 n. 1), at p. 167.

<sup>4</sup> Loc. cit. (above, p. 306 n. 1), at p. 78.

<sup>5</sup> Loc. cit. (above, p. 304 n. 1), at p. 168.

<sup>6</sup> See Keeton, *Basic Text on Insurance Law* (1971), pp. 156-8. At least in so far as negotiations aimed at the settlement of the claim are concerned, practice indicates that the host country has normally been willing to deal with the compensated investor, and that the objection based on the argument that he no longer is the real party in interest and lacks *locus standi* is quite rare.

Be that as it may, Broches makes two alternative suggestions to avoid the problem. The first is for the insurer to provide in the contract of insurance that the payment to the insured would be conditional on the insured's pursuing his remedies against the host State before the Centre. The indemnification of the insured by the insurer would become final and definitive only to the extent that the proceedings before the Centre did not bring about a complete indemnification of the insured by the host State. This technique evades, of course, the problem of subrogation, since the payment is conditional and no subrogation takes place, and is in line with similar techniques used in the field of insurance.<sup>1</sup> The second alternative would be for the foreign investor to provide in the agreement with the host State that the fact of the investor's indemnification by a third party would not affect the investor's right to proceed against the host Government. Should such a stipulation derogate from the law which would otherwise apply, this would, according to Broches, be entirely in accordance with Article 42 of the Convention which gives the parties a complete freedom to choose the rules of law in accordance with which the Tribunal shall decide.<sup>2</sup>

The staff of I.C.S.I.D. has indeed drafted a model clause, as an appropriate choice of law by the parties, which reads as follows:

VIII. It is hereby agreed, that the right of the Investor to request the settlement of a dispute by the Centre or to take any step as a party to a proceeding pursuant to this agreement shall not be affected by the fact that [he]/[it] has received full or partial compensation, on a conditional or an absolute basis, from any third party (whether a private person, a State, a governmental agency or an international organization), with respect to any loss or injury that is the subject of the dispute [provided that the Host State may require evidence that such third party agrees to the exercise of those rights by the Investor].<sup>3</sup>

Another way of resolving the problems raised by the issue of subrogation in relation to an I.C.S.I.D. arbitration is to provide in the bilateral agreement between the host country and the Government of the investor (rather than, as in the last case, in the agreement between the investor and the host Government), both for the subrogation of the Government of the investor to the rights of the investor following remittance of the insurance payments and, more importantly, that such payments shall not affect the rights of the insured-investor to proceed before an I.C.S.I.D. arbitration. Such an approach was adopted in the Agreement between the Government of France and the Government of Tunisia with respect to Protection of Investments, signed in Paris on

<sup>1</sup> Loc. cit. (above, p. 304 n. 1), at p. 168. See also Meron, 'The Insurer and the Insured under International Claims Law', *American Journal of International Law*, 68 (1974), p. 628 at p. 645.

<sup>2</sup> Loc. cit. (above, p. 304 n. 1), at p. 168.

<sup>3</sup> *ICSID, Model Clauses* (above, p. 306 n. 3), at p. 10. The explanatory note to this clause reads as follows: 'A number of capital-exporting States have developed schemes for insuring their nationals, through governmental or paragovernmental agencies, against losses they may suffer by investing in certain foreign countries; moreover, plans are being formulated by the World Bank for establishing a multilateral international investment insurance scheme to be administered by an international organization. If an investor should be reimbursed by such a national or international agency, it may not be possible for the latter to appear as successor in interest (see Clause VII) by subrogation, unless it has the status of a private person who can properly litigate with the host State pursuant to the Convention. Therefore it may be necessary that any dispute proceeding under the Centre be conducted in the name of the original investor. Since, however, the applicable national law (chosen or determined in accordance with Article 42 (1) of the Convention—see Part H, below) may require that all litigation be conducted solely by the real party in interest, the clause below in effect constitutes a choice of law by the parties with respect to this procedural issue, designed to eliminate any such restrictive requirement.'



30 June 1972.<sup>1</sup> The advantage of such an approach is that the Government of the investor, the capital-exporting Government, would not have to rely on the investor for the protection of its own interests in every case in which investment agreements subject to I.C.S.I.D. arbitration are made. However, such umbrella agreements may encounter stronger political objections on the part of the host State, and may not always be feasible.

#### THE PROPOSED INTERNATIONAL INVESTMENT INSURANCE AGENCY

It has already been pointed out that governmental insurance (or guarantees) of investments abroad is normally based on the notion of subrogation, i.e. in case of indemnity being paid by the State or by the public institution charged with administration of the guarantee programme<sup>2</sup> to the investor, the latter's claims against the host country are transferred to the guarantor, whether by virtue of contractual stipulations or by operation of law. The guarantor State can then proceed to press its claim against the host country, either through diplomatic channels, or by arbitral or judicial proceedings if that is possible, especially if commitments to submit to arbitration or to adjudication have been made in the form of a bilateral agreement with respect to the protection of investments or otherwise. The difficulty with the entire operation of the principle of subrogation is that the host State might refuse to recognize the principle and object to the transfer of the claim from the individual investor to his national State. Indeed, past experience indicates that certain developing countries, and particularly Latin American States, object in principle to the operation of subrogation with respect to foreign investments on their territory. They regard subrogation as contrary to their sovereignty and as politically dangerous in that it transforms a dispute between a State and a foreign investor into a dispute between two sovereign States.

In the light of such difficulties, given the public interest in facilitating the flow of investment capital from developed to developing countries, and the fact that private insurance is either not available or not adequate to provide the necessary coverage against non-commercial risks to foreign investments, it is natural that the World Bank and its dynamic legal staff should have attempted to prepare blueprints for the establishment of a multilateral intergovernmental agency to deal with investment insurance, so as to avoid most of the difficulties and dangers involved in a direct State-to-State

<sup>1</sup> *Journal officiel de la république française*, No. 253, 28 October 1972. The key provisions of this Agreement read as follows:

'Art 1 er. Le Gouvernement français pourra, après un examen cas par cas et dans le cadre de sa réglementation, accorder la garantie de l'État français à des investissements effectués sur le territoire de la République tunisienne par des ressortissants français, personnes physiques ou morales, dans les conditions prévues à l'article 2 ci-après.

'Art. 2. Ces investissements auront obtenu l'agrément du Gouvernement tunisien et feront l'objet de la part de celui-ci à l'égard desdits ressortissants français d'un engagement particulier comportant notamment le recours au Centre International pour le Règlement des Différends relatifs aux Investissements si, en cas de litige, un accord amiable n'a pu intervenir dans un délai de trois mois.

'Art. 3. Si l'État français, en vertu d'une garantie donnée pour un investissement réalisé sur le territoire de la République tunisienne, effectue des versements à ses propres ressortissants, personnes physiques ou morales, il est de ce fait subrogé de plein droit à l'égard du Gouvernement tunisien dans les droits de ces ressortissants.

'Lesdits versements n'affectent pas les droits du bénéficiaire de la garantie à recourir au C.I.R.D.I. ou à poursuivre les actions introduites devant lui jusqu'à l'aboutissement de la procédure.'

<sup>2</sup> Regarding investment guarantee programmes, see O.E.C.D. Report, *Investing in Developing Countries* (1972).



confrontation resulting from the operation of the principle of subrogation. Indeed, the Bank undertook such a study as early as 1965, following a request of the Organisation for Economic Co-operation and Development (O.E.C.D.),<sup>1</sup> which sent to the Bank a Report on the Establishment of a Multilateral Investment Guarantee Corporation. Draft articles of agreement for an International Investment Insurance Agency (I.I.I.A.) were prepared in 1966, 1968 and most recently in 1972. The 1972 draft, together with a Staff Memorandum on Principal Outstanding Issues (hereinafter referred to as the Staff Memorandum), were circulated to the Executive Directors of the Bank by its President under cover of a Memorandum dated 16 April 1973, but since not enough Governments of both developed and developing States have expressed interest in going forward with the establishment of such an agency, no further work on the proposal has been carried out by the Bank. There is no reason, however, why the diplomatic death of the proposals should mean also oblivion in legal literature. Indeed, the skill and the imagination shown by their draftsmen may yet inspire national and international initiatives. But first, a word about the source material. Drafts prepared by the legal staff of the Bank and the President's Memoranda to the Executive Directors have the character of restricted documents. However, since the entire text of the 1972 draft and of the Staff Memorandum have been reprinted in a United States Congressional document, the author feels that he may properly discuss and quote such materials.<sup>2</sup>

Article III of the draft Articles of Agreement dealt with the insurance operations of the proposed agency, and it defines insurable risks. It should be observed that the draft follows the usual categories of political, non-commercial risks, which are normally insurable under Governmental insurance or guarantee programmes: expropriation, inconvertibility of currency, and armed conflict or civil unrest. But, interestingly, the Board of Directors of the Bank is empowered to decide by a weighted vote to insure other non-commercial risks which discourage international investment.

Section 1 further provided that the 'Agency shall not insure risks if it is satisfied that they can be insured through commercial channels at reasonable rates'. This is of importance, because funds available for insurance of foreign investment are always limited, and the notion of Governments stepping into insurance programmes originated from the realization that private insurance was not a viable alternative.

Section 2 defined eligible investments. To qualify for the Agency's insurance the investment had to meet five tests: it had to be made by a non-governmental investor; it had to be 'sponsored for insurance' by a member State; it had to be made in the territory of a developing country which was not the sponsoring country (a situation could exist where a developing country itself sponsors investments in another developing country); and, finally, it must have been approved for the purpose of insurance by the developing country in which the investment was to be made.

The above criteria stress the basic idea that the investments, to be insurable, must be private and have the characteristics of development financing which is of benefit to the host country, as determined by it.

A further, fifth, test for the eligibility of investments for insurance is that they must be new, i.e. committed only after certain events enumerated in section 2 (c).

It should be observed that also national insurance programmes of investments

<sup>1</sup> See, in general, Martin, 'Multilateral Investment Insurance: The O.E.C.D. Proposal', *Harvard International Law Journal*, 8 (1967), p. 280.

<sup>2</sup> Staff of Foreign Affairs Division, Congressional Research Service, Library of Congress for the House Committee on Foreign Affairs, 93d Congress, 1st Session, 'The Overseas Private Investment Corporation: A Critical Analysis', *Committee Print*, 1973, p. 130.

abroad often require that an investment be 'new' in order to be eligible for insurance. Suppliers' credits were not to be insurable unless determined by the Agency to have the characteristics of development financing.

Section 3, relating to sponsorship, provided that a member State may sponsor for insurance investments made by investors of any nationality, provided only that another member State did not object on the ground that the investor was its national, and may sponsor for insurance investments made by investors of more than one nationality. These provisions reflect the multilateral character of the proposed Agency and the fact that there is no relationship between the operations of the Agency and the right of States to exercise diplomatic protection of their nationals.

Section 4 established, subject to certain conditions, the principle that transfers of insured investments do not terminate contracts of insurance, if the contracts of insurance so provide. Section 5 provided for the possibility of reinsurance by the Agency against all or part of the loss resulting from a risk covered by investment insurance or guarantee programmes of member States if both the risk and the investment met the eligibility tests established for insurance by the Agency.

Section 6 dealt with the premiums to be charged for each type of risk or combination of types of risks.

Section 9 dealt with the most important question of subrogation. It read as follows:

(a) To the extent provided in any contract of insurance made pursuant to this Agreement the Agency upon payment made or provided for in accordance with the terms of such contract shall be subrogated and shall succeed to all the rights and assets of the insured investor with respect to or arising out of the insured investment and the loss suffered, and subject to the provisions of sub-section (b) below, members shall recognize such subrogation and succession.

(b) Notwithstanding the provisions of subsection (a) a host country need not recognize the subrogation or succession of the Agency to the rights or claims of an insured investor in relation to a payment made or provided for, if such payment related to a matter in dispute between the host country and the insured investor that the host country has consented to submit to the jurisdiction of the International Centre for Settlement of Investment Disputes (the 'Centre') for settlement by arbitration under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the 'Convention'), unless (i) the Secretary-General of the Centre or an arbitral tribunal constituted by it decides that that dispute is not within the jurisdiction of the Centre (for some reason other than the failure of such insured investor to consent to such jurisdiction) or (ii) the host country should fail to abide by or to comply with any award rendered by such a tribunal.

Paragraph (a) of Section 9 established the basic principle of subrogation: Upon payment in accordance with the contract of insurance, the Agency is subrogated to all the rights and assets of the insured in relation to the loss suffered, and, conversely, States members of the Agency—and, of course, the host State in particular—must (subject only to a limited number of exceptions) recognize such subrogation.

Paragraph (b) qualified the duty of the host State to recognize subrogation by giving precedence to an arbitral settlement between the insured investor and the host State under I.C.S.I.D. auspices and avoiding the elevation of the dispute to an inter-governmental one. Thus, the host State need not recognize subrogation if it has agreed to submit the dispute to I.C.S.I.D. for arbitration, except if the dispute does not lie within I.C.S.I.D.'s competence, as determined by its Secretary-General or the arbitral tribunal (for some reason other than the investor's failure to consent to such jurisdiction), or if the host State fails to abide by or to comply with the arbitral award.



It will be recalled that the very *raison d'être* of the establishment of a multilateral insurance agency was to make subrogation into a non-political, technical, non-confrontation issue. Nevertheless, the question of subrogation has given rise, in the Board of Directors of the Bank, to debates strikingly paralleling those with respect to the question of subrogation within the context of investment guarantee programmes of individual capital-exporting States. Thus, the Staff Memorandum points out that 'in Committee, some Directors objected to any provision for subrogation on the ground that it would ultimately lead to a confrontation between the Agency and a member country. This objection would seem to go to the essence of a multilateral insurance institution.'<sup>1</sup>

In addition to this fundamental argument, the opponents of subrogation argued that subrogation might encourage the Agency to pay claims under insurance contracts in the expectation of recovery from the host country. The staff of the Bank responded that experience with respect to the operation of national insurance programmes which made provision for subrogation showed that national agencies paid claims only when satisfied, or where a court or arbitral tribunal had determined, that the claim was well-founded. Of course, in accordance with elementary principles, the mere fact that the insurer pays a claim under an insurance contract does not justify recovery from the host country. Recovery must depend on the merits of the original claim of the insured.

To satisfy the opponents of subrogation, the staff proposed that the Agency should not lodge a formal claim based on subrogation against the host State, unless it were approved by its Board of Directors by a qualified majority vote.

Article IV provided for the financing of the Agency, and especially for arrangements involving sharing of administrative expenses, premium income and losses.

Closely related to the question of subrogation is, of course, the question of settlement of disputes. Article VI, on Settlement of Disputes, established the principle that disputes involving members of the Agency, or a member of the Agency on the one hand and the Agency itself on the other, were to be settled by negotiation. Failing settlement by negotiation and unless the parties agreed to another method of settlement, any such disputes were to be settled by arbitration, as provided for in Schedule B to the I.I.I.A. Agreement.

In the Bank's Board of Directors opposition was expressed to the provision for compulsory international arbitration on the grounds that it was inconsistent with the concept of sovereignty as understood by the opposing countries, that it increased the risk of confrontation between the Agency and the host State, and that embarrassment might be caused to the relations between capital-exporting and capital-importing members. Because of this opposition, it was provided that any decision by the Agency as subrogee of an insured investor to seek—in accordance with the provisions of Article VI—a binding determination by arbitration of any dispute with a host country required a qualified majority vote in the Agency's Board of Directors.

Of special interest is section 1 (c) of Article VI: the Agency as subrogee shall not have the right to seek the final determination by arbitration of any dispute if the host country need not recognize the succession of the Agency under Article III 9 (b), and 'the host country . . . [waived] any objection to a claim asserted against it by an insured investor as contemplated by Section 9 (b) of Article III upon the ground that the insured investor has been paid by the Agency.' This provision is of importance, for the thrust of the proposals is to encourage arbitration between the host State and the insured investor. On the assumption that the host country waives—in the context of

<sup>1</sup> Para. 15.



an I.C.S.I.D. arbitration to which it has consented—any objection to a claim by the insured investor on the ground that he has been paid by the Agency and therefore no longer is the real party in interest, the Agency as subrogee shall not seek the final determination by arbitration of the dispute.

Section 1 (e) provides further for the relationship between determinations made in an I.C.S.I.D. arbitration between the host State and the insured investor and the arbitration between the host State and the Agency so as to ensure that the former prevails, as follows:

In any proceeding for the final determination by arbitration of a dispute between the Agency as subrogee of an insured investor and a host country, the arbitral tribunal shall be bound by the determination of any issue regarding an investment insured by the Agency and on account of which it is subrogated pursuant to Section 9 (a) of Article III, by an award rendered in an arbitration proceeding between the investor and the host country under the Convention.

In the discussions which took place in the Board of Directors of the Bank with respect to the establishment of the I.I.I.A., no consensus was reached on several principal issues: the link between the Agency and the Bank, voting rights (particularly as regards capital-exporting and capital-importing countries), financial participation by developing countries, subrogation and arbitration. Moreover, since the first draft on the I.I.I.A. was prepared by the staff of the Bank in 1966, most capital-exporting countries have developed their own national programmes of insurance of investments abroad, and there was a growing reluctance to delegate to the Bank functions successfully performed by national institutions.<sup>1</sup> In short, the proposals died for lack of positive

<sup>1</sup> Some of the potential rivalries which might arise in the relations between a multilateral insurance agency and national insurance agencies, and the suggestion that the former should be relegated to the field of reinsurance, appear from the following answer of the Overseas Private Investment Corporation to questions submitted by the Subcommittee on Foreign Economic Policy of the House Committee on Foreign Affairs:

‘Question. If a multilateral insurance agency is created, should it replace or supplement existing national insurance programmes (if supplement, why would national programmes still be needed, and how could an international insurance agency supplement national programmes)?

Answer. A multinational insurance agency should be created to supplement existing national insurance programmes. National programmes will still be needed to deal with individual national investors. Considerations of language, location and national foreign investment policy require the continuation of national insurance programmes. Any multinational insurance agency would need to maintain balance in its exposure. Other members would not, for example, allow it to insure a disproportionate share of U.S. investment. Therefore, some means of rationing access to the agency would be needed, with part of the insurance risk borne by national agencies. An international insurance agency could ideally supplement the national programmes through reinsurance. . . .’

*Overseas Private Investment Corporation, Hearings before the Subcommittee on Foreign Economic Policy of the House Committee on Foreign Affairs*, 93d Congress, 1st Session (*Committee Print*, 1973, p. 361). See also *ibid.*, at p. 341. Elsewhere, the major issues holding up agreement on the I.I.I.A. were described as follows:

‘The first problem is the scepticism of several key developed countries, especially Germany and Japan, that a multilateral insurance agency can serve their investors as reliably or cheaply as their national agencies. Some are reluctant to pool risks with the United States.

‘The second major problem concerns compulsory arbitration of disputes and subrogation rights. World Bank officials say they cannot operate without these rights. Andean Pact countries, however, refuse to agree to these conditions, and many L.D.C.’s are reluctant to accept compulsory arbitration as a general principle.

‘A third issue is how the board of directors would be elected and how voting rights would be divided.’ (*The Overseas Private Investment Corporation: A Critical Analysis*’ (above, p. 310 n. 2), p. 32; notes omitted.)

interest on the part of both developed and developing countries. But the proposals deserve to be regarded as imaginative and constructive models.

It should be observed that with the demise of the Bank's proposals for the establishment of the I.I.I.A. no other suggestions have been made for the creation of a general multilateral insurance scheme. On the regional level, the European Commission proposed in December 1972 the establishment of a European Community guarantee system for private investment in third countries, which was aimed not at replacing the national guarantee programmes, but at providing security for investors from member States which do not have such programmes, and to encourage cooperation between firms from member countries in investing outside the European Community. Only investments made by two or more companies from member States, or in projects of particular interest to the community as a whole were to be eligible for guarantees. Except for States associated with the community, capital-importing States, to be eligible, would have had to conclude bilateral agreements with the community. Investments were subject to approval by the host State and had to be of special importance to the development of its economy. After an initial grant from community funds, the programme would be dependent on premiums and other guarantee-related levies. Premiums would vary in relation to the degree of risk.<sup>1</sup>

#### CONCLUSIONS

The negotiating history of the I.I.I.A. articles indicates that States, and particularly capital-importing States, do not necessarily agree to certain controversial principles, such as subrogation, merely because they would operate in the relations between a multilateral intergovernmental agency and a State, rather than in the direct relations between a capital-importing and a capital-exporting State. It is unfortunate that the I.I.I.A. articles have become a dead letter. They were sensible, constructive and progressive and, if adopted, could in the long run have made a contribution to the improvement of the international investment climate and to the depoliticization of subrogation.

Given the demise of the I.I.I.A. proposals, I.C.S.I.D. arbitrations are even more important for they remain the principal vehicle for the settlement, according to principles of law, of legal disputes, arising out of investments, between a foreign investor and the host State directly and on equal footing, without the intervention of the national State of the investor. But, to maintain and to strengthen this vehicle in relation to the protection of investments covered by government guarantees, it is desirable to avoid possible difficulties arising out of the operation of the principle of subrogation by a routine incorporation in the agreements made between foreign investors and the host States of Model Clauses VII and VIII. In cases where bilateral agreements have been concluded between the national State of the investor and the host State with respect to the protection of investments, the salutary example set by the Agreement between France and Tunisia of 30 June 1972 should be followed.

<sup>1</sup> *Hearings on Multinational Corporations and United States Foreign Policy before the Subcommittee on Multinational Corporations of the Senate Committee on Foreign Relations*, 93d Congress, 1st Session (1973), part 3, at p. 641.

# THE EXERCISE OF THE JUDICIAL FUNCTION WITH RESPECT TO THE INTERNATIONAL LABOUR ORGANIZATION\*

By EBERE OSIEKE<sup>1</sup>

## I. INTRODUCTION

According to its Constitution, the International Labour Organization<sup>2</sup> was established to promote 'universal and lasting peace . . . based upon social justice' by improving conditions of labour through the elaboration and adoption of International Labour Conventions and Recommendations.<sup>3</sup> It was thus contemplated that the fundamental purpose of the Organization should be attained mainly through legislative activities, and the use of the term 'judicial function' for certain activities with respect to the Organization requires explanation.

Though not free from controversy,<sup>4</sup> there seems to be some agreement among legal writers that the judicial function consists primarily in the interpretation of constitutional and legislative instruments and in the determination of disputes between two or more contending parties.<sup>5</sup> Accordingly, the interpretation of the I.L.O. Constitution and International Labour Conventions,<sup>6</sup> and the settlement of disputes between Members of the I.L.O., seem to be appropriately characterized as the exercise of the judicial function with respect to the Organization. And although the judicial function was not envisaged as the primary means for attaining the fundamental purpose of the I.L.O., it would be erroneous to suppose that this function is outside the scope of activities in the Organization. The observance of the I.L.O. Constitution and the universal application of Conventions may serve to promote universal and lasting peace based upon social justice, but the efficacy of these instruments will depend, to a large extent, on the manner in which they are interpreted and applied. Furthermore, peace based upon social justice will not be attained in the international community if its members live under continuous threat of confrontation with each other. Therefore, the proper interpretation and application of the I.L.O. Constitution and Conventions, and the peaceful determination of disputes between Members, constitute an integral and significant part of the activities of the I.L.O. in the attainment of its fundamental purpose.

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<sup>2</sup> Except where otherwise necessary, the International Labour Organization will henceforth be referred to as the I.L.O.

<sup>3</sup> See the Preamble and Article 1 of the I.L.O. Constitution, and the Declaration of Philadelphia, 1944, annexed thereto.

<sup>4</sup> See Ebere Osieke, *The Constitutional Character of International Organisations*, pp. 18-19 (thesis submitted to the University of London for the award of the degree of Doctor of Philosophy in Laws, and deposited with the University of London).

<sup>5</sup> See S. A. de Smith, *Judicial Review of Administrative Action* (1959), p. 38; Sir Carleton Kemp Allen, *Law and Orders* (1945), p. 3; J. F. Garner, *Administrative Law*, 3rd edn. (1970), p. 11; Carl Friedrich, *Constitutional Government and Democracy* (1950), pp. 105-6; J. L. Brierly, *Law of Nations*, 6th edn. by C. H. M. Waldock (1963), pp. 346-7.

<sup>6</sup> International Labour Conventions will henceforth be referred to as 'Conventions'.



This was recognized by the States which created the Organization, since the Constitution contains provisions relating to its interpretation, and to the settlement of disputes between Members, and between them and other entities. It is now proposed to examine these constitutional provisions, and the practice which has supplemented them over the last fifty-five years.

## II. THE INTERPRETATION OF THE I.L.O. CONSTITUTION

The provision of the Constitution on this subject is Article 37 (1), which states that 'any question or dispute relating to the interpretation of the Constitution . . . shall be referred for decision to the International Court of Justice'.

An important feature of these provisions is that responsibility for the determination of questions and disputes relating to the interpretation of the I.L.O. Constitution has been assigned to an independent judicial organ outside the Organization. But the provisions raise some important questions, the answers to which cannot be found in the Constitution; for instance, there is no guidance as to the meaning of the words 'question' and 'dispute', the manner in which a matter is to be referred to the Court, or the effect of its 'decision'. The provisions of Article 37 (1) have, however, been acted upon on several occasions,<sup>1</sup> and one of the cases will now be examined to find out whether such questions have been resolved.

Among the first problems referred to the Permanent Court of International Justice<sup>2</sup> was a case involving the interpretation of Article 389 of the Treaty of Versailles, which stated that 'the Members undertake to nominate Government delegates and advisers chosen in agreement with the industrial organizations, if such organizations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries'.<sup>3</sup> The case arose from a protest submitted to the International Labour Office on 22 October 1921 by the Netherlands Confederation of Trade Unions complaining that the nomination of the Netherlands Workers' Delegate to the 3rd Session of the International Labour Conference<sup>4</sup> had been made without its consent. The Union claimed that, as it was the industrial organization most representative of workers of the Netherlands, the appointment had not been made in accordance with the provisions of Article 389 of the Treaty of Versailles.<sup>5</sup> In its reply, the Government

<sup>1</sup> Many of the cases were concerned with the competence of the I.L.O. See, for instance, the cases on: *Competence of the I.L.O. with respect to agricultural labour*, P.C.I.J., Series B, Nos. 2 and 3, pp. 9-43; *Competence of the I.L.O. with respect to agricultural production*, P.C.I.J., Series B, Nos. 2 and 3, pp. 49-61; *Competence of the I.L.O. to regulate, incidentally, the personal work of the employer*, P.C.I.J., Series B, No. 13; and *Free City of Danzig and the I.L.O.*, P.C.I.J., Series B, No. 18.

For an examination of the question of the competence of the I.L.O., see generally, Ebere Osieke, *The Constitutional Character of International Organisations*, pp. 186-218; C. W. Jenks, 'La compétence de l'Organisation internationale du Travail', *Revue de droit international et de législation comparée*, 3<sup>ème</sup> série, vol. 18 (1937), pp. 156-83; G. Fischer, *Les Rapports entre l'Organisation internationale du Travail et la Cour permanente de justice internationale*, Thèse, Geneva (1945), pp. 319-48; Jean Morellet, 'Legal Competence of the International Labour Organisation', *The Annals of the American Academy of Political and Social Science*, no. 166 (1933); A. Berenstein, 'Le travailleur et sa protection par l'Organisation internationale du Travail' in *Festschrift für Walther Hag* (Berne, 1968), pp. 167-77; Nicolas Valticos, *Traité de droit du travail* (1970), pp. 197-208.

<sup>2</sup> The powers of the International Court of Justice under Article 37 (1) were originally assigned to the Permanent Court of International Justice by Article 423 of the Treaty of Versailles, 1919.

<sup>3</sup> These provisions are now embodied in Article 3 (5) of I.L.O. Constitution.

<sup>4</sup> The International Labour Conference will henceforth be referred to as 'the Conference'.

<sup>5</sup> *Official Bulletin of the I.L.O.*, vol. 5 (1922), pp. 9-10.

of the Netherlands stated that the nomination was made in agreement with the three industrial organizations of workers which together constituted the 'most representative' in the Netherlands; and that the nomination had been made in accordance with the provisions of Article 389 of the Treaty of Versailles, which referred to 'industrial organizations', and that if it had been intended there to prescribe that the nomination should be made in agreement with the 'most important organization', then the plural 'organizations' would not have been used.<sup>1</sup>

The matter was considered at the 3rd Session of the Conference in 1921, which unanimously decided<sup>2</sup> to request the Permanent Court of International Justice to give an Advisory Opinion.<sup>3</sup> The request was submitted by the Governing Body to the Council of the League of Nations which, on 12 May 1922, asked the Court for an Advisory Opinion on whether the Workers' Delegate for the Netherlands at the 3rd Session of the Conference had been nominated in accordance with the provisions of Article 389 (3) of the Treaty of Versailles.<sup>4</sup>

In an Advisory Opinion delivered on 31 July 1922<sup>5</sup> the Court answered the question in the affirmative.<sup>6</sup> It rejected the contention that the word 'organizations' under the provisions of Article 389 (3) referred to employers' and workers' organizations, and that a government should only nominate non-government delegates chosen in agreement with the one most important organization among those representative of workers. It stated that the only possible construction of the word 'organizations' was that the plural referred to employers' as well as to workers' organizations; that a different interpretation would require unequivocal terms to compel its adoption; and that the wording of Article 389 (3) lent no support to a different interpretation.<sup>7</sup>

This throws light on some, but not all, of the questions about the provisions of Article 37 (1). First, despite the absence of any guidance in the I.L.O. Constitution on the matter, the organs of the Organization have not made any attempt to define the words 'question' and 'dispute'; and as it is necessary to establish the meaning of these words in order to determine the scope of the provisions of Article 37 (1), recourse may be made to international jurisprudence on the matter. The definition of a 'dispute' has received the attention of some international tribunals, among them the Permanent Court of International Justice and the International Court of Justice. In the *Mavromatis Palestine Concessions* Case, 1924, the former Court stated that a dispute was

<sup>1</sup> Ibid., pp. 13-14.

<sup>2</sup> The decision of the Conference was based on the recommendation of its Credentials Committee, which pointed out that it was of the highest importance to arrive at an authoritative interpretation, as the adoption of any solution could be founded only on a proper interpretation of the provisions of Article 389: Suppl. Report of the Credentials Committee, 3rd Session of the Conference, 1921: *Record of Proceedings*, pp. 615-16.

<sup>3</sup> During the discussion, some delegates, notably Mr. Jouhaux, Workers' Delegate of France, and Dr. A. de Agüero y Betancourt, Government Delegate of Cuba, expressed the view that the Conference would not be bound by the letter or form of the decision of the Court: *ibid.*, pp. 520 and 522 respectively.

<sup>4</sup> *Official Bulletin of the I.L.O.*, vol. 5 (1922), pp. 384-9.

<sup>5</sup> *Designation of the Workers' Delegate for the Netherlands to the Third Session of the International Labour Conference*, P.C.I.J., Series B, No. 1.

<sup>6</sup> Ibid., p. 27.

<sup>7</sup> P.C.I.J., Series B, No. 1, pp. 21-3. The Court pointed out, however, that while the aim of each government should be to reach an agreement with all the most representative organizations of employers and workers, as the case may be, what was required of governments was that they should do their best to effect an agreement which could be regarded, in their particular circumstances, as the best for the purpose of ensuring the representation of the workers of the country: *ibid.*, p. 25.



'a disagreement on a point of law or fact, or a conflict of legal views, or of interests between two persons'.<sup>1</sup> In its Advisory Opinion concerning the *Interpretation of the Peace Treaties*, in 1951, the International Court of Justice said that whether there was an international dispute was a matter for objective determination; and that, confronted with two sides holding opposite views about the performance or non-performance of certain treaty obligations, it would conclude that an international dispute had arisen.<sup>2</sup> Accordingly, it seems that a dispute arises, in the meaning of Article 37 (1) of the I.L.O. Constitution, if there is a disagreement<sup>3</sup> or conflict of views, between two or more Members, or other relevant entities, relating to the interpretation of the Constitution.<sup>4</sup> Thus, the disagreement between the Netherlands Confederation of Trade Unions and the Government of the Netherlands concerning the meaning and scope of Article 389 (3) of the Treaty of Versailles would constitute a 'dispute' under the provisions of Article 37 (1).

Secondly, while the I.L.O. Constitution does not contain any provisions on the manner in which a matter is to be referred to the Court, the fact was that cases had to be referred to the Permanent Court of International Justice in the form of a request for an Advisory Opinion by the Council of the League of Nations, and not directly by the organs of the I.L.O.; this was because Article 14 of the Covenant of the League of Nations, and Article 65 of the Statute of the Permanent Court of International Justice as amended by the 1929 Revision Protocol, provided that requests for Advisory Opinions of the Court were to be made by the Council of the League of Nations.<sup>5</sup> Since the General Assembly of the United Nations has now, in accordance with the provisions of Article 96 (2) of the Charter, authorized the I.L.O. to request Advisory Opinions from the International Court of Justice, through the Conference or the Governing Body acting in pursuance of an authorization by the Conference,<sup>6</sup> the position is that any question or dispute which arises under Article 37 (1) may be referred to the Court by any of these organs in the form of a request for an Advisory Opinion.

It has been suggested by some writers that a question or dispute about the interpretation of the I.L.O. Constitution may also be referred to the International Court of Justice by way of contentious proceedings.<sup>7</sup> Article 37 (1) does not exclude such a

<sup>1</sup> *P.C.I.J.*, Series A, No. 2 (1924), p. 11.

<sup>2</sup> *I.C.J. Reports*, 1950, pp. 74-5. See also the judgment of the I.C.J. in the *South West Africa* cases (Ethiopia v. South Africa, Liberia v. South Africa), *I.C.J. Reports*, 1962, p. 345; and the separate opinion of Judge Jessup in that case, *ibid.*, p. 424. According to Hans Kelsen, 'a dispute exists if one party makes a claim against another party and the other party rejects the claim', *Law of the United Nations* (1951), p. 360; see also Georg Schwarzenberger, *International Law as applied by International Courts and Tribunals*, vol. 1, 3rd edn. (1957), p. 72.

<sup>3</sup> For a definition of 'disagreement', see the separate opinion of Judge Onyeama in the case concerning the *Jurisdiction of the Council of the International Civil Aviation Organisation*, *I.C.J. Reports*, 1972, p. 87.

<sup>4</sup> The use of the word 'question' in Article 37 (1) suggests that a situation different from a 'dispute' is also contemplated. A 'question' will normally arise if a doubt is cast or objection made with respect to a certain subject (cf. *Shorter Oxford Dictionary* (1973), p. 1729). Therefore, a question will arise, in the context of Article 37 (1), if a doubt is cast upon, or objections are made to, certain provisions of the I.L.O. Constitution.

<sup>5</sup> Cf. C. W. Jenks, *The International Protection of Trade Union Freedom* (1957), p. 159.

<sup>6</sup> Article 9 (2) and (3) of the Agreement between the I.L.O. and the United Nations.

<sup>7</sup> See C. W. Jenks, *The International Protection of Trade Union Freedom*, pp. 158 and 160; and Finn Seyersted, 'Settlement of Disputes of Intergovernmental Organisations by Internal and External Courts', reprint from *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 24 (February 1965), p. 95 (footnote 311). See also Shabtai Rosenne, *The World Court—What it is and how it works*, 3rd edn. (1973), p. 38.



possibility; but, as international organizations have no *locus standi* to appear before the Court as parties in contentious cases,<sup>1</sup> such a matter can be brought to the Court only by the Members of the I.L.O., and with respect to a question or dispute in which two or more of them are involved.<sup>2</sup>

Finally, the fact that there is no provision in the I.L.O. Constitution as to the binding effect of a decision of the International Court of Justice in cases referred to it under Article 37 (1) appears to have led some Delegates to the Conference to the view that such a decision would not be binding.<sup>3</sup> These views might be reinforced by certain provisions of the I.L.O. Constitution which indicate that a decision of the Court may be binding in some cases.<sup>4</sup> Thus, it could be argued that, if it had been contemplated that the 'decision' of the Court should be binding, express provisions would have been inserted to that effect in the Constitution. On the other hand, it is possible to argue that the absence of any provisions to the contrary in the I.L.O. Constitution means that a decision of the Court under Article 37 (1) has binding force; and this finds support in that 'decision', which is used in Article 37 (1), is also used in Article 59 of the Statute of the Court to describe its judgments. In any event, as no appeal lies against a decision given by the International Court of Justice, the effect of its 'decision' under Article 37 (1) will be, in most cases, to put an end to a question or dispute relating to the interpretation of the I.L.O. Constitution; and it might be argued that a final judgment could not be regarded as being without binding force. Perhaps the truth lies somewhere in between. There is no doubt that if a question or dispute between two or more Members were referred to the Court by one of them, the proceedings before the Court would take on a contentious character and its decision would consequently be binding upon the parties concerned, by virtue of the provisions of Article 59 of the Statute of the Court.<sup>5</sup> But, if the matter is submitted to the Court in the form of a request for an Advisory Opinion, its decision will not give rise, *per se*, to binding obligations;<sup>6</sup> although it will be for the organs of the I.L.O. to determine the effect to be given to the decision, in the light of the circumstances.<sup>7</sup> And a determination of the International Court of Justice, even by Advisory Opinion, on a question or dispute about the interpretation of the I.L.O. Constitution, will constitute a most important and impartial judicial pronouncement on the matter and should not lightly be set aside.

<sup>1</sup> See Article 34 (1) of the Statute of the I.C.J. See also C. W. Jenks, *The Prospects of International Adjudication* (1964), pp. 185-208; Shabtai Rosenne, *The World Court*, p. 66. For arguments that international organizations should have *locus standi in judicio* before the I.C.J., see Jenks, *op. cit.*, pp. 208-21.

<sup>2</sup> A question or dispute between a Member and organ of the I.L.O. or other entity, or between these last two, cannot be referred to the I.C.J. in the form of contentious proceedings because of the *locus standi* rule: cf. Rosenne, *The World Court*, p. 66.

<sup>3</sup> See above, p. 317 n. 3.

<sup>4</sup> See, for instance, Article 31, which provides that the decision of the Court relating to a complaint or matter referred to it consequent upon a decision of a Commission of Inquiry will be final. In this respect Article 33 authorizes the Conference, at the recommendation of the Governing Body, to take action against any Member which fails to carry out the decision of the Court. See also Article 37 (2), which stipulates that any 'applicable judgment or advisory opinion' of the Court will be binding on the tribunals specified therein.

<sup>5</sup> This Article states that 'the decision of the Court has no binding force except between the parties and in respect of that particular case'.

<sup>6</sup> Cf. Shabtai Rosenne, who has pointed out that the principle underlying the advisory competence is that qualified international organizations are entitled to ask the Court for an opinion on legal questions, that opinion itself not constituting *per se* a 'decision' with which anyone is legally bound to comply: *The World Court*, p. 80.

<sup>7</sup> For views on what have been described as 'binding Advisory Opinions', see Seyersted, *op. cit.* (above, p. 318 n. 7), pp. 113-17.

### III. INTERPRETATION OF INTERNATIONAL CONVENTIONS ADOPTED IN THE I.L.O.<sup>1</sup>

Under the I.L.O. Constitution, responsibility for the interpretation of Conventions is assigned to the International Court of Justice and to a tribunal which may be established for that purpose. The practice of the Organization indicates that the International Labour Office also interprets Conventions in certain circumstances. The various parts played by these organs in the exercise of this function will be considered below.

#### 1. *Interpretation of Conventions by the International Court of Justice*

The powers of the Court to interpret Conventions are laid down in Article 37 (1) of the I.L.O. Constitution, which provides that 'any question or dispute relating to the interpretation of . . . any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice'.<sup>2</sup>

Only one case has so far been referred to the Court in accordance with this provision. This resulted from a request, dated 2 June 1930, from the British Government to the International Labour Office, proposing that Article 3 of the Convention concerning the employment of women during the night should be revised<sup>3</sup> to make it clear that its provisions did not apply to persons holding positions of supervision or management. The proposal was considered,<sup>4</sup> and rejected,<sup>5</sup> by the 15th Session of the Conference in 1931.<sup>6</sup>

On 20 January the British Government requested the Governing Body to ask the International Court of Justice for an Advisory Opinion on the matter and, on 9 May 1932, the following question was presented to the Court:

Does the draft Convention concerning the employment of women at night apply to women employed in the industrial undertakings covered by the draft Convention who hold positions of supervision or management and are not ordinarily engaged in manual work?

In an Advisory Opinion delivered on 15 November 1932<sup>7</sup> the Court said that Article 3 of the Convention was couched in general terms and free from ambiguity or obscurity.

<sup>1</sup> On this question, see also C. W. Jenks, *Law, Freedom and Welfare* (1963), pp. 121-2, and *The International Protection of Trade Union Freedom* (1957), pp. 548-50; Nicolas Valticos, *Traité de droit du travail*, p. 149.

<sup>2</sup> As these provisions are identical to those relating to the interpretation of the Constitution by the Court, and as there is no guidance as to the meaning of the terms 'question' or 'dispute', the organ which will refer the matter to the Court, and the binding effect of its decision, the views expressed above with respect to the provisions on the interpretation of the Constitution will apply here with equal force.

<sup>3</sup> The provisions were: 'Women without distinction of age shall not be employed during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed.'

<sup>4</sup> For the decision of Governing Body to put the item on the agenda, see 51st Session of Governing Body (January 1931), *Minutes*, p. 105.

<sup>5</sup> See generally, 15th Session of Conference (1931), *Record of Proceedings*, pp. 477-8, for the discussions and record vote on this matter.

<sup>6</sup> During the discussions in the plenary meeting, opinion was divided among delegates. Some Employers' delegates considered that the proposed amendment would make the Convention clearer and more flexible; others felt that the existing provisions were wide enough to cover the proposed amendment, and some Workers' delegates opposed any amendment: *ibid.*, p. 324.

<sup>7</sup> *Interpretation of the Convention of 1919 concerning the Employment of Women during the Night*, P.C.I.J., Series A/B, No. 50 (1932), p. 365.

It prohibited the employment during the night, in industrial establishments, of women, without distinction of age and, taken by itself, it necessarily applied to the categories of women contemplated by the question submitted to the Court.<sup>1</sup>

As a result of the Advisory Opinion of the Court, the matter was once again placed on the agenda of the 18th Session of the Conference, 1934. On this occasion, the Conference decided that the Convention should not apply to women holding positions of supervision and not ordinarily engaged in manual work, and adopted an amendment to that effect.<sup>2</sup>

Two important points may be noted with respect to those proceedings. First, the proposal made by the British Government for a modification of Article 3 of the Convention 'to make it clear' amounted to a question about the interpretation of its provisions. Thus, even if there was no conflict of views at the Conference on the meaning and scope of the Article,<sup>3</sup> the matter was nevertheless covered by Article 37 (1) of the Constitution. Secondly, it is interesting that in 1931 the Conference rejected the proposal to specify that the Convention did not apply to women who held positions of supervision and management, but adopted an amendment to that effect in 1934 after the Advisory Opinion of the Court that the Convention applied to such women. That the Conference did not ignore the Advisory Opinion of the Court, but took it into account in the formulation of its subsequent decision, shows that it considered that a 'decision' of the Court under Article 37 (1), even in the form of an Advisory Opinion, was not without some legal force.<sup>4</sup>

## 2. *Interpretation of Conventions by Tribunals*

Article 37 (2) of the I.L.O. Constitution authorizes the Governing Body to 'make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgment or advisory opinion of the International Court of Justice shall be binding upon any tribunal. . . . Any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they make thereon shall be brought before the Conference.'

These provisions, which have not yet been applied in practice, were incorporated into the Constitution in 1946 on the recommendation of the Conference Delegation on Constitutional Questions. The Delegation pointed out in its report that the extent to which the I.L.O. would have access to the International Court of Justice would depend on decisions to be taken by the General Assembly of the United Nations and that the jurisdictional clauses contained in the Constitutions of other specialized agencies were more flexible in character than those of Article 37 of the I.L.O. Constitution. In view of the possibility that the I.L.O. would have no access to the Court, it recommended that the Constitution should be amended to make it possible for questions

<sup>1</sup> Ibid., p. 373.

<sup>2</sup> 18th Session of the Conference (1934), *Record of Proceedings*, p. 667. The new provisions now form Article 8 of the Convention.

<sup>3</sup> See p. 320 n. 6 above.

<sup>4</sup> The view may even be ventured that by taking positive action to reverse its earlier decision, in the light of the Advisory Opinion of the I.C.J., the Conference was indirectly giving effect to the decision of the Court. As such, it would have considered the Opinion as conclusive and not without binding force.



and disputes relating to the interpretation of Conventions to be referred to a tribunal appointed by the I.L.O.<sup>1</sup>

### 3. *Interpretation of Conventions by the International Labour Office*<sup>2</sup>

The I.L.O. Constitution does not contain express provisions which either authorize the International Labour Office<sup>3</sup> to interpret, or prohibit it from interpreting, the texts of Conventions adopted by the Conference. It has, however, become the consistent practice of Members of the I.L.O. to request the Office for advice on the meaning to be attributed to particular provisions of some of these instruments.<sup>4</sup> It may be instructive to consider the basis and nature of this interpretative function.

The first question is whether the Office is competent to interpret Conventions. Such competence might be derived either from the I.L.O. Constitution, or from the established practice of the Organization. Article 10 of the Constitution provides that the functions of the Office 'shall include the collection and distribution of information on all subjects relating to the international adjustment of conditions of industrial life . . .'. Thus, if the interpretation given by the Office is regarded as 'information' which will enable Members to apply the relevant Conventions,<sup>5</sup> its competence may be found in these provisions.<sup>6</sup> But even if its competence cannot be conclusively established by express provisions of the I.L.O. Constitution, the fact that it has constantly interpreted Conventions for over fifty-five years without protest or objection from the Members of the I.L.O. shows that this function has become an established constitutional practice of the Organization.

Since the power to interpret Conventions is assigned, under the I.L.O. Constitution, to the International Court of Justice and to a tribunal appointed for that purpose, a question also arises of how far the interpretation of these instruments by the Office overlaps with that by the Court or a tribunal. The practice shows that a request is normally submitted by a Member merely to obtain information or clarification of certain provisions of a Convention. The terms in which such requests are couched do not cast doubt on, or amount to objection to, the relevant provisions, and there is

<sup>1</sup> *Report of the Conference Delegation on Constitutional Questions* (1946), pp. 61-2.

<sup>2</sup> On this subject, see also Jenks, *Law, Freedom, and Welfare*, pp. 122-3, and 'Interpretation of International Labour Conventions by the International Labour Office', this *Year Book*, 20 (1939), pp. 132-41.

<sup>3</sup> Except where otherwise necessary, the International Labour Office will henceforth be referred to as 'the Office'.

<sup>4</sup> Some of these cases were examined by Jenks in 'Interpretation of International Labour Conventions', this *Year Book*, 20 (1939), pp. 132-41. For details of some recent interpretations, see *Official Bulletin of the I.L.O.*, vol. 49 (1966), pp. 389-401; vol. 50 (1967), pp. 343-5; and vol. 53 (1970), pp. 379-85.

<sup>5</sup> Some of the views expressed by the Office in the past suggest that it regards its interpretation as 'information'. See, for instance, paragraph 5 of the letter of 26 May 1921 from Mr. H. B. Butler, Deputy Director-General of the I.L.O., to the Norwegian Minister of Social Affairs: *Official Bulletin of the I.L.O.*, vol. 3 (1921), p. 627. See also the interpretation, at the request of the German Federal Ministry of Labour and Social Affairs, of the Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96): *Official Bulletin of the I.L.O.*, vol. 49 (1966), p. 389.

<sup>6</sup> The use of the words 'shall include' in Article 10 also suggests that the Office may have competence to deal with matters not expressly referred to in that Article. Furthermore, the Office may undertake the interpretative function by virtue of Article 10 (2) (b) which requires it, subject to such directions as the Governing Body may give, to 'accord to governments, at their request, all appropriate assistance within its power in connection with the framing of laws and regulations on the basis of the decisions of the Conference'.

nothing to suggest that requests arise from a disagreement or conflict of views between two or more Members and/or other entities. Thus, as the jurisdiction of the Court, or of a tribunal, relates to a 'question or dispute', it would seem that the interpretation of Conventions by the Office does not constitute a derogation from their powers.

A question arises concerning the binding force of interpretations made by the Office. The I.L.O. Constitution and other relevant instruments have no provisions on this matter, and it has not been seriously considered by the conference and the Governing Body.<sup>1</sup> But the answer depends on the purpose of these interpretations. When complying with requests for interpretation, the Office usually points out that although it has no authority under the I.L.O. Constitution to interpret Conventions, it does so in order to ensure that the terms of the Conventions are given the same meaning and application by Members.<sup>2</sup> The Office recognizes, however, that it 'can in no way change the signification or the scope of the decisions of the Conference [which are] the results of prolonged discussions among the three groups of interests there represented, and from the agreement in which these exchanges of opinion have resulted it does not appertain to the International Labour Office to depart by either weakening or strengthening the texts which have been voted . . . and its only function must be to furnish every explanation as to the real sense . . . ' of the texts.<sup>3</sup>

Thus, the main purpose of the interpretation of Conventions by the Office is to provide Members with 'information' which will help them in their application of the Conventions. Since a Member which is a party to a Convention is under an obligation to apply its provisions in the same manner as other Member parties,<sup>4</sup> the 'information' embodied in the interpretation made by the Office enables a Member to fulfil its obligations relating to that Convention. Consequently, if an interpretation given by the Office is not rejected by the Members of the I.L.O.,<sup>5</sup> they appear to be

<sup>1</sup> The Office has, however, made at least two important statements on the subject. In a Memorandum to the Governing Body in October 1921, it stated that tacit acceptance of an interpretation acted upon by a member and communicated through the Official Bulletin to the other members constituted important authority which could always be invoked for that interpretation: 9th Session of the Governing Body (October 1921), *Minutes*, pp. 365-6.

In an Opinion which it gave in 1938, the Office also stated that when an Opinion which it gave had been submitted to the Governing Body and published in the Official Bulletin, and had met with no adverse comment, the Conference should, in the event of its subsequently including in another Convention a provision identical with or equivalent to the provisions which had been interpreted by the Office, be presumed, in the absence of any evidence to the contrary, to have intended that provision to be understood in the manner in which the Office had interpreted it: *Official Bulletin of the I.L.O.*, vol. 23 (1938), no. 1, p. 32. It seems that while the absence of objections to an interpretation after its publication may be construed as its implied acceptance by the Members, it is debatable whether such an implied acceptance will constitute conclusive evidence that the interpretation is binding on all Members of the I.L.O.

<sup>2</sup> See, for instance, *Official Bulletin of the I.L.O.*, vol. 3 (1921), p. 383, and vol. 46 (1966), p. 389. In fact, the general practice of the Members is to request 'certain information'—Germany: *Official Bulletin of the I.L.O.*, vol. 49 (1966), p. 389; 'clarification'—Sweden: *ibid.*, vol. 49 (1966), p. 390; also Denmark: *ibid.*, vol. 53 (1970), p. 382; or even 'opinion of the Office'—Republic of China: *ibid.*, vol. 50 (1967), p. 343.

<sup>3</sup> Letter of 11 May 1920 from the Office to the Swiss Department of Public Economy: *Official Bulletin of the I.L.O.*, vol. 3 (1921), pp. 388-9.

<sup>4</sup> This obligation appears to be implicit in the provisions of Article 19 (5) of the I.L.O. Constitution, which states that Members are to take necessary action to make effective the provisions of Conventions to which they are parties. There is no doubt that the objects and purposes of a Convention will be defeated if Members apply its provisions in accordance with their own interpretations which conflict with those adopted by other Members.

<sup>5</sup> If a Member rejects the interpretation given by the Office, a 'question' or 'dispute' will



bound by it as a result of their obligation to apply in a uniform manner the provisions of Conventions to which they are parties.

#### IV. SETTLEMENT OF DISPUTES OTHER THAN THOSE RELATING TO THE INTERPRETATION OF THE I.L.O. CONSTITUTION<sup>1</sup>

The I.L.O. Constitution contains provisions which authorize action against Members failing to discharge their obligations under Conventions to which they are parties.<sup>2</sup> These procedures may result from representations and complaints.

##### 1. *Representations against Members of the I.L.O.*

The provisions on this subject are contained in Articles 24 and 25. Article 24 states that 'in the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit'. According to Article 25, 'if no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it'. Whilst responsibility for dealing with these representations has been assigned to the Governing Body, rather than to the International Court of Justice, the I.L.O. Constitution does not lay down the complete procedure to be applied or say what constitutes an 'industrial association' under Article 24. But as several representations have been dealt with over the last fifty-five years, the practice of the Organization shows how cases are determined.

The first representation under Article 24 was made in June 1924 by the Japanese Seamen's Union and the Japanese Merchant Marine Officers' and Engineers' Association against the Japanese Government for its alleged failure to secure the effective observance of the Convention for establishing facilities for seamen, which it ratified on 23 November 1922;<sup>3</sup> and the second was submitted in 1930 by the Latvian Central probably arise relating to the interpretation of the Convention, and the matter will then be decided in accordance with the provisions of Article 37 (1) of the I.L.O. Constitution.

<sup>1</sup> On this subject, see also Francis Wolf, *L'Organisation internationale du Travail: Aspects actuels de son oeuvre et de son fonctionnement* (1966), pp. 51-2; Jenks, *Law, Freedom and Welfare*, pp. 124-9, *International Protection of Trade Union Freedom*, pp. 154-8, and *Prospects of International Adjudication*, pp. 696-8.

<sup>2</sup> The Constitution also contains provisions on the nature of action that may be taken against a Member for failure to comply with certain provisions of the Constitution. According to Article 30, 'if any Member fails to take the action required by Article 19 (5) (b) or 19 (7) (b) (i) to submit the Conventions and Recommendations adopted by the Conference to its competent organs for the enactment of legislation or other action, any other Member may refer the matter to the Governing Body and if the latter finds that there has been such a failure, it may refer the matter to the Conference'. No serious disputes appear to have arisen under these provisions. This may be because the provisions of Article 30 do not specify the nature of the action that should be taken by the Conference, or whether the Governing Body can in fact recommend any action. In any case, failure to discharge the obligations which arise from Article 19 constitutes a breach of that Article, and the Conference appears to possess power to deal with breaches of the Constitution, even in the absence of the provisions of Article 30: see Ebere Osieke, *The Constitutional Character of International Organisations*, pp. 194-5.

<sup>3</sup> Governing Body, 24th Session (October 1924), *Minutes*, p. 336.



Trade Union Bureau against the Latvian Government for its alleged failure to secure the effective observance of the Convention for the establishment of facilities for finding employment for seamen.<sup>1</sup> There was at that time no approved procedure for dealing with such representations. What happened, however, was that before they were considered by the Governing Body, the Office communicated them unofficially to the governments of the Members against which they were made,<sup>2</sup> and in the light of their observations,<sup>3</sup> the Governing Body then decided that the Governments had not failed to secure the effective observance of the Conventions.<sup>4</sup>

On 8 April 1932 the Governing Body adopted special Standing Orders which, as amended on 5 February 1938, lay down the procedure for dealing with representations.<sup>5</sup> According to the Standing Orders, a representation should be made in writing and should refer specifically to Article 24 of the I.L.O. Constitution; it should also include an allegation that a Member has failed in some respect to secure the effective observance, within its jurisdiction, of a Convention which it has ratified.<sup>6</sup> All steps in the procedure concerning a representation should be confidential.<sup>7</sup> The International Labour Office should only 'acknowledge receipt' of the representation and communicate it immediately to 'all members of the Governing Body', for consideration at its next session;<sup>8</sup> it should also communicate to the Governing Body, before the session in which the matter would be considered, all the information in its possession concerning the receivability of the representation 'without proceeding for that purpose to put any part of the procedure under Articles 24 and 25' into operation.<sup>9</sup> The Governing Body should set up a Committee composed of three of its members, chosen respectively from the Government, Employers' and Workers' groups, to examine the representation and report back to it with proposals on what should be done.<sup>10</sup> After hearing the views

<sup>1</sup> Governing Body, 51st Session (January 1931), *Minutes*, pp. 219-25.

<sup>2</sup> Governing Body, 24th Session, *Minutes*, pp. 219-25; and also 51st Session, *Minutes*, pp. 20 and 219.

<sup>3</sup> In its reply, the Japanese Government stated that it had not failed to secure the effective observance of the Convention and outlined the measures which it was taking to give effect to its provisions: Governing Body, 24th Session, *Minutes*, pp. 336-9.

<sup>4</sup> For the discussions and decision by the Governing Body on the representation from the Japanese Seamen's Union, see Governing Body, 24th Session, *Minutes*, pp. 336-40 and 342-5. For the decision on the representation from the Latvian Central Trade Union Bureau, see Governing Body, 55th Session (October 1931), *Minutes*, pp. 616 and 769. During the discussion of the representation against the Japanese Government in the Governing Body, Mr. Mahaim stated that the 'unofficial communication' to the Japanese Government and the explanation from the latter to some extent anticipated the procedure laid down in the Constitution under which it was for the Governing Body to communicate a representation to the government concerned if it thought fit to do so. He concluded that the reply given by the Japanese Government was an act of courtesy, and did not result from an obligation. Some members expressed surprise at the remarks made by Mr. Mahaim, and Mr. Thobery stated that the action taken by the Director-General was most fortunate in that it gave the Japanese Government an opportunity to submit its explanations: Governing Body, 24th Session, *Minutes*, pp. 336-40.

<sup>5</sup> For text of the Standing Orders, see Governing Body, 58th Session (1932), *Minutes*, pp. 164-6.

<sup>6</sup> Article 3.

<sup>7</sup> Article 1. This Article confirmed a decision made by the Governing Body in 1931 during the consideration of the representation from the Latvian Trade Union Bureau that as 'publication' was the first sanction which it could apply, the examination of any representation should, in its initial stages, be confidential: Governing Body, 51st Session, *Minutes*, p. 20.

<sup>8</sup> Article 2 (1).

<sup>9</sup> Article 2 (2).

<sup>10</sup> Article 2 (3). No representative or national of the Member against which the representation is made and no person occupying an official position in the association of employers or workers which made the representation may be appointed a member of the Committee: *ibid.*

of the Committee, the Governing Body could examine the receivability of the representation as regards form;<sup>1</sup> and if receivable on that ground, a preliminary examination could then be made of its substance.<sup>2</sup>

The Standing Orders also provide that the Governing Body could declare the representation not well founded; or communicate it to the government against which it was made, inviting or not inviting that government to make a statement in reply; or obtain further information.<sup>3</sup> If the Governing Body received a satisfactory statement in reply, it could declare the proceedings closed; otherwise it could ask for further information or open discussion of the publication of the representation and statement.<sup>4</sup> Finally, the Governing Body could, at any time, institute the procedure for complaints against the Member concerned, in accordance with the provisions of Article 26 (4) of the I.L.O. Constitution.<sup>5</sup>

The few representations submitted to the Office after the adoption of the special Standing Orders<sup>6</sup> were dealt with in accordance with the procedure laid down therein.

The foregoing practice of the I.L.O. in the application of Articles 24 and 25 appears to resolve some, but by no means all, of the questions which arise. While the question of procedure has been satisfactorily resolved by the special Standing Orders, there is no guidance in that document as to what constitutes an 'industrial association' under Article 24. Consequently, the question still arises whether a political association of employers and workers, or any group of persons, may be regarded as possessing the right to submit a representation against a Member of the I.L.O. It seems that, as the meaning attributed to the phrase 'industrial association' will differ from one State to the other, a proper solution would be for the Governing Body to decide, in the circumstances of each case, whether a representation has been submitted in accordance with the provisions of the Constitution and special Standing Orders.<sup>7</sup>

A further question is whether an industrial association should be registered or located in the territory of the Member against which it makes a representation. The Constitution is silent on this matter, and the representations submitted hitherto have been by industrial associations against Members in whose territory they carried out their activities; but it would seem that an industrial association might submit a

<sup>1</sup> Article 3 (1).

<sup>2</sup> Article 4 (1).

<sup>3</sup> Article 4.

<sup>4</sup> Article 7. In this case, it should fix the date of the proceedings and should, if necessary, invite the government against which the representation is made to send a representative to take part in the proceedings: Article 9.

<sup>5</sup> For the provisions of this Article, see below, p. 328.

<sup>6</sup> These include the representation submitted in 1936 by the Société de Bienfaisance des Travailleurs de l'Île Maurice against the Government of Mauritius; the representation submitted by the Agricultural Workers' Union of Estonia concerning the application in Estonia of the Right of Association (Agriculture) Convention, 1921, discussed by the Governing Body at a private meeting during its 82nd Session, 3-5 February 1938, and in its 84th Session, 31 May, 4 and 17 June 1938, when it was decided that the representation was not well founded; the representation submitted by the Madras Union for Textile Workers concerning the application in India of the Unemployment Convention: *Official Bulletin of the I.L.O.*, vol. 22 (1937), pp. 61-6; see also the more recent representation submitted by the General Confederation of Italian Agriculture concerning the application by Italy of the Employment Service Convention, 1948 (No. 88), considered by the Governing Body at its 180th Session: *Official Bulletin of the I.L.O.*, vol. 53 (1970), pp. 313-14.

<sup>7</sup> This appears to be the established practice of the I.L.O. The Governing Body decided in 1936 that the Société de Bienfaisance des Travailleurs de l'Île Maurice was not an 'industrial association' under Article 24 and could not validly submit a representation against the Government of Mauritius: *Official Bulletin of the I.L.O.*, vol. 22 (1937), no. 2, pp. 68-9. See also Jenks, *The International Protection of Trade Union Freedom*, pp. 155-6.



representation against a Member even if it is not located in the territory of that Member. But no representation may be made against a Member respecting a Convention to which it is not a party, and a Member is not answerable if the failure to secure the effective observance<sup>1</sup> of a Convention occurs outside its jurisdiction.<sup>2</sup>

Some doubts were expressed before 1932 whether a representation should be 'unofficially' communicated by the Office to the Member against which it was made, before the Governing Body had considered the matter.<sup>3</sup> The position has been clarified by the special Standing Orders, which stipulate that only the Governing Body should communicate a representation to such Member.

'Publication' is the main step that may be taken against a Member if it is established, as a result of a representation, that the Member has failed to carry out its obligations under a Convention to which it is a party. It can be argued that this is not an effective sanction.<sup>4</sup> Yet it would appear that publication is not without some effect. It would draw attention to the breach and could lead either to the condemnation of the Member concerned by other Members, Delegates to the Conference, and relevant industrial associations, or to the initiation of a complaint against such Member in accordance with the provisions of Article 26 of the I.L.O. Constitution;<sup>5</sup> or to both of these consequences. As a Member may not wish to be publicly ostracized for the breach of a Convention to which it is a party, 'publication' under Article 25 appears to act as a deterrent, rather than as a sanction.

Perhaps the most interesting feature of Article 24 is that it grants a right to industrial associations to enforce the observance of international agreements to which they are not parties.<sup>6</sup> This is an important departure from the normal international practice that non-parties do not have a right to enforce a treaty or Convention,<sup>7</sup> and is a recognition of the interest of industrial associations generally in the effective implementation of Conventions, and of the fact that the attainment of the fundamental purpose of the I.L.O. depends on the effective discharge by the Members of their obligations under Conventions, and effective supervision by all concerned.

## 2. *Complaints against Members of the I.L.O.*

Complaints constitute the second category of actions that may be taken against Members for the breach of their obligations under Conventions.

### (a) *Initiation of Complaints*

Article 26 (1) of the I.L.O. Constitution grants a right to any Member 'to file a complaint with the International Labour Office if it is not satisfied that any other

<sup>1</sup> The use of the phrase 'effective observance' suggests that a representation may be made against a Member even if it is securing the performance of a Convention, provided the industrial association concerned considers the performance as 'ineffective'.

<sup>2</sup> 'Jurisdiction' in this respect must be distinguished from 'territory'. All of the territory of a Member may not be under its jurisdiction and a Member may exercise jurisdiction in areas outside its territory. Thus, whether or not a Member has failed to secure the effective observance of a Convention 'within its jurisdiction' will depend on the nature of such jurisdiction at the time the alleged failure occurred.

<sup>3</sup> See above, p. 325 n. 4.

<sup>4</sup> Cf. Jenks, *The International Protection of Trade Union Freedom*, pp. 496-7.

<sup>5</sup> For the provisions of this Article, see below, p. 328.

<sup>6</sup> It is recognized that these associations can participate, through their representatives, in the elaboration and adoption of the Conventions, but only Members of the I.L.O. can be parties to these instruments.

<sup>7</sup> The position of States is clearly stated in Article 34 of the Vienna Convention on the Law of Treaties 1969, which provides that '... a treaty does not create either obligations or rights for a third State without its consent'.



Member is securing the effective observance of any Convention which both have ratified', and Article 26 (4) authorizes the Governing Body to adopt the complaints procedure 'either of its own motion or on receipt of a complaint from a delegate to the Conference'. Here again, an effect of the provisions of Article 26 (4) is to grant a right of complaint in respect of international agreements to entities which are not parties to them; though, as Members are not under an obligation to implement Conventions which they have not ratified, a complaint cannot be validly initiated against a Member under Article 26 with respect to a Convention to which it is not a party.

The use of the phrase 'if it is not satisfied' in Article 26 (1) suggests that the test to be applied for determining the possibility of breach of a Convention is subjective. By 1975 only five complaints have been made under Article 26. Of these, two were filed by Members of the I.L.O., two were from Delegates to the Conference, and one was initiated by the motion of the Governing Body.

The first complaint from a Member was filed on 24 February 1961 by the Government of Ghana against the Government of Portugal. In its letter to the Office, the Government of Ghana stated that it was not 'satisfied' that the Government of Portugal was securing the effective observance in her African territories of Mozambique, Angola, and Guinea of the Abolition of Forced Labour Convention 1957 (No. 105), which both Portugal and Ghana had ratified; that the complaint was filed under Article 26 of the I.L.O. Constitution; and requested that the Governing Body should appoint a Commission of Inquiry to consider and report upon the complaint.<sup>1</sup> During its 149th Session in June 1961,<sup>2</sup> the Governing Body appointed its 'Officers'—a committee of three of its members—to examine the complaint and recommend appropriate action.<sup>3</sup> The Officers recommended, *inter alia*, that the complaint should without further discussion be referred to a Commission of Inquiry.<sup>4</sup> This proposal was accepted by the Governing Body which subsequently appointed such a Commission.

The second complaint from a Member was filed on 31 August 1961 by the Government of Portugal against the Government of Liberia, with respect to the application of the Forced Labour Convention 1930 (No. 29), which was ratified by Liberia on 1 May 1931, and by Portugal on 26 June 1966. This complaint was also referred to, and determined by, a Commission of Inquiry.<sup>5</sup>

The first complaint from a Delegate to the Conference was raised orally by Mr. Mamnadas M. Mehta, the Indian Worker's Delegate to the 18th Session of the Conference 1934, during the debate on the report of the Conference Committee on

<sup>1</sup> *Report of the Commission appointed under Article 26 of the I.L.O. Constitution to examine the complaint filed by the Government of Ghana against the Government of Portugal*, Geneva (1962), p. 1. See also *Official Bulletin of the I.L.O.*, vol. 45 (April 1962), no. 2, suppl. II, for text of the report.

<sup>2</sup> The complaint was first considered by the Governing Body during its 148th Session, Geneva, 7–10 March 1961, when its Officers stated: (a) that the Governing Body had not adopted any Standing Orders concerning the procedure to be followed for the consideration of complaints, and (b) that no discussion of the merits of the complaint was to be made until further information had been obtained from both Ghana and Portugal with respect to the complaint: *Minutes*, pp. 59–60 (Discussion); *Report of Committee*, Appendix XXII, pp. 134–5.

<sup>3</sup> Governing Body, 149th Session (June 1961), *Minutes*, pp. 31–4.

<sup>4</sup> *Ibid.*, Appendix IV to *Minutes*, pp. 93–4. See also *Report of the Ghana v. Portugal Commission of Inquiry*, op. cit. (above, n. 1), pp. 8–9. For the findings and recommendations of the Commission, see *ibid.*, pp. 351–80.

<sup>5</sup> See *Report of the Commission appointed under Article 26 of the I.L.O. Constitution to examine the complaint filed by the Government of Portugal against the Government of Liberia*, Geneva (1963), pp. 242–85.

the Application of Conventions.<sup>1</sup> He stated that the Government of India was not applying the Convention on hours of work in its letter and spirit; and that he raised the matter as a complaint under Article 411 (4) of the Treaty of Versailles—now Article 26 (4) of the I.L.O. Constitution—and requested the Governing Body to appoint a Commission of Inquiry to examine the complaint.<sup>2</sup> The complaint was subsequently considered by the Governing Body, which adopted a resolution expressing the hope that the Government of India would apply the Convention to all categories of workers.<sup>3</sup>

The second complaint under Article 26 (4) was submitted on 25 June 1968 by certain Workers' Delegates to the 52nd Session of the Conference,<sup>4</sup> against the Government of Greece for its 'failure to secure the effective observance' of the Freedom of Association and Protection of Rights to Organize Convention 1948, and the Right to Organize and Collective Bargaining Convention 1949.<sup>5</sup> The complaints were referred by the Governing Body to its Officers during its 173rd Session in November 1968 for consideration. The Officers reported that the complainants were the Workers' Delegates of their countries to the 52nd Session of the Conference and accordingly had a right, under Article 26 (4) of the I.L.O. Constitution, to file a complaint if they were not satisfied that Greece was securing the effective observance of the two Conventions. They also recommended that the complaint should, without further discussion, be referred to a Commission of Inquiry.<sup>6</sup> This recommendation was accepted by the Governing Body, and the complaint was subsequently determined by a Commission of Inquiry.<sup>7</sup>

The last complaint and the only one initiated on the motion of the Governing Body<sup>8</sup>

<sup>1</sup> 18th Session of the Conference (1934) (22nd plenary meeting, Friday, 22 June 1934).

<sup>2</sup> Ibid., *Record of Proceedings*, p. 452. The manner in which this complaint was made raises some interesting questions. As Article 26 (4) specifically provides that the Governing Body may adopt the complaints procedure 'on receipt of a complaint from a delegate to the Conference', it is doubtful whether a verbal statement in the plenary meeting of the Conference will amount to the 'receipt of a complaint' by the Governing Body. In order to eliminate any doubts on this point, it would seem that all complaints should be addressed in writing to the Governing Body, or raised at its meeting by a delegate to the Conference.

During the debate on the complaint at the Conference, the Indian Government Delegate stated that only Members of the I.L.O. had rights to file complaints against Members: *ibid.*, p. 456. It would seem, however, that as Article 26 (4) expressly refers to 'a Delegate to the Conference', *all delegates* have a right to submit complaints. This view is confirmed by the practice of the I.L.O.: see *Official Bulletin of the I.L.O.*, vol. 20 (1935), p. 15, and vol. 54 (1957), no. 2, p. 1.

<sup>3</sup> *Official Bulletin of the I.L.O.*, vol. 20 (1935), p. 15.

<sup>4</sup> These were Messrs. H. Beerman, S. B. Vognbjerg, O. Osunde, J. Morris, and Josef Hlavicka, Workers' Delegates respectively from the Federal Republic of Germany, Denmark, Norway, Canada, and Czechoslovakia: *Official Bulletin of the I.L.O.*, vol. 54 (1971), no. 2, p. 1.

<sup>5</sup> This latter Convention was referred to by Mr. Josef Hlavicka but not by the other complainants: *ibid.*, p. 1.

<sup>6</sup> *Report of the Commission, Official Bulletin of the I.L.O.*, vol. 54 (1971), no. 2, pp. 77-9.

<sup>7</sup> For the findings and recommendations of the Commission of Inquiry, see *ibid.*, pp. 54-65.

<sup>8</sup> The report of the Conference Committee on the Application of Conventions and Recommendations presented to the 16th Session of the Conference, 1932 (15th sitting, Wednesday, 27 April), contained serious criticisms of Cuba and Greece for the non-application of Conventions which they had ratified, and for their failure to submit annual reports to the Office on the Conventions. The Committee felt that in cases of allegations of such persistent failures, the question should be seriously raised as to whether the Governing Body should set in motion the complaints procedure laid down in the Constitution. However, the explanations offered by the Government delegates of Greece and Cuba were accepted by the Committee and no complaint was formally lodged against them: 16th Session of the Conference (1932), *Record of Proceedings*, pp. 322-3.



was against the Government of Chile. Consequent upon the adoption by the Conference at its 59th Session 1974 of a resolution concerning human and trade union rights in Chile,<sup>1</sup> the Governing Body decided at its 193rd Session, May–June 1974,<sup>2</sup> to establish a Commission of Inquiry under Article 26 of the I.L.O. Constitution to examine the observance by Chile of the Hours of Work (Industry) Convention 1919 (No. 1), and the Discrimination (Employment and Occupation) Convention 1958 (No. 111).<sup>3</sup> The Commission was subsequently established and is expected to complete its deliberations by the middle of 1975.<sup>4</sup>

(b) *Determination of complaints in the I.L.O.*

The first action that may be taken on a complaint is prescribed by Article 26 (2) of the I.L.O. Constitution which provides that 'the Governing Body may, if it thinks fit . . . communicate with the government in question in the manner described in Article 24'. It seems clear from these provisions that although the complaint is to be filed with the Office, only the Governing Body is competent to deal with it. Its powers in this respect are discretionary: it may communicate the complaint to the Member against which it is made and may invite it to make such statement on the subject as it may think fit.

The alternative action that may be taken on a complaint is to refer it to a Commission of Inquiry. As four out of the five complaints received so far have been dealt with in this manner, Commissions of Inquiry appear to play an important part in the determination of complaints, and it is necessary to examine their more important characteristics.

(i) *Appointment of a Commission of Inquiry.* Article 26 (3) of the I.L.O. Constitution provides that 'if the Governing Body does not think it necessary to communicate the complaint to the government' against which it is made, 'or if, when it has made such communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider the complaint and to report thereon'.

The power granted to the Governing Body under these provisions is discretionary. Thus, if a Member or Delegate to the Conference submits a complaint and even requests the appointment of a Commission of Inquiry, the Governing Body is free to decide whether it would be appropriate in the circumstances.<sup>5</sup> If it decides to refer a complaint to a Commission of Inquiry,<sup>6</sup> the established practice is that no discussion of the merits of the complaint will be permitted until it has been considered by the Commission. This practice reflects the recommendation of the Officers of the Governing Body that it would be 'inconsistent with the judicial nature of the procedure

<sup>1</sup> For the text of the resolution, see 59th Session of the Conference, *Provisional Records*, no. 1, pp. 1/8–1/9.

<sup>2</sup> Doc. G.B., 193/24/46, and Doc. G.B. 193/PV, p. V/10.

<sup>3</sup> Doc. G.B., 194/4/21, 194th Session, Governing Body, 12–15 November 1974.

<sup>4</sup> For a preliminary report of the activities of the Commission of Inquiry, see *ibid.*, pp. 3–5.

<sup>5</sup> This view is confirmed by the practice in the I.L.O. When the Indian Workers' Delegate raised a complaint against the Indian Government in 1934 and requested that a Commission of Inquiry should be appointed to examine the matter, the Governing Body decided not to appoint a Commission: *Official Bulletin of the I.L.O.*, vol. 20 (1935), p. 15.

<sup>6</sup> The decision of the Governing Body as to whether or not to refer a complaint to a Commission of Inquiry is normally based on the recommendation of its Officers. However, while all the past recommendations in this respect have been accepted, the Governing Body appears to be free to reject a recommendation when necessary: cf. *Report of the Portugal v. Liberia Commission of Inquiry*, op. cit. (above, p. 328 n. 5), p. 9.



provided for in Articles 26-9 and 31-4 of the Constitution that there should be any discussion in the Governing Body of the merits of a complaint until the Governing Body has before it the contentions of the government filing the complaint and the government against which the complaint is filed, together with an objective evaluation of these contentions by an impartial body. Nor would such discussion be appropriate while a proposal to refer the complaint to a Commission of Inquiry is pending before the Governing Body or while the complaint is *sub judice* before a Commission of Inquiry.<sup>1</sup>

(ii) *Composition of a Commission of Inquiry.* The composition of a Commission of Inquiry is not regulated by the I.L.O. Constitution, nor by any Standing Order, but by the practice of the Organization. In their report in 1961 on the complaint filed by the Government of Ghana against the Government of Portugal, the Officers of the Governing Body advised that if their recommendation that the complaint should be referred to the Commission of Inquiry were accepted, the Members of the Commission should be nominated by the Director-General of the International Labour Office.<sup>2</sup> This was accepted,<sup>3</sup> and three eminent judges subsequently nominated by the Director-General were appointed as members of the Commission of Inquiry.<sup>4</sup> The practice of appointing three persons,<sup>5</sup> at the nomination of the Director-General, as members of a Commission of Inquiry has been consistently followed since 1961, and may now be regarded as established.<sup>6</sup>

The members of a Commission of Inquiry are required to make a declaration that they will perform their duties and exercise their powers 'honourably, faithfully, impartially and conscientiously'—a solemn declaration which corresponds to that made by judges of the International Court of Justice.<sup>7</sup>

(iii) *Procedure of a Commission of Inquiry.* The I.L.O. Constitution does not contain

<sup>1</sup> *Report of the Portugal v. Liberia Commission of Inquiry*, op. cit. (above, p. 328 n. 5), p. 9.

<sup>2</sup> Governing Body, 149th Session (June 1961), *Minutes*, Appendix XV, pp. 93-4. See also *Report of the Ghana v. Portugal Commission of Inquiry*, op. cit. (above, p. 328 n. 1), pp. 8-9.

<sup>3</sup> Governing Body, 149th Session (June 1961), *Minutes*, pp. 31-4.

<sup>4</sup> The Chairman was Mr. Paul Ruegger (Switzerland), Chairman of the I.L.O. Committee on Forced Labour, 1956-9; Member of the Permanent Court of Arbitration; Associate Member of the Committee of Experts on the Application of Conventions and Recommendations; Ambassador, former Minister of Switzerland in Rome and London. The other members of the Commission of Inquiry were: Mr. Enrique Armand-Ugon (Uruguay), former Judge of the I.C.J., 1952-61, and former Judge of the High Court of Uruguay, 1949; and Mr. Isaac Forster (Senegal), first President of the Supreme Court of the Republic of Senegal, and Member of the Committee of Experts on the Application of Conventions and Recommendations: Governing Body, 149th Session (June 1961), *Minutes*, p. 94.

<sup>5</sup> The records show that at least one of these has held very high judicial office.

<sup>6</sup> For the composition of the Portugal v. Liberia Commission of Inquiry, see its *Report*, op. cit. (above, p. 328 n. 5), pp. 10-11. For that of the Commission of Inquiry on the complaints against Greece, see *Report of the Commission*, op. cit. (above, p. 329 n. 6), p. 6; and for that of the Commission of Inquiry on the complaint against Chile, see Doc. G.B. 194/4/21, 194th Session, Governing Body, 12-15 November 1974, p. 3.

<sup>7</sup> The declaration made by the members of the Commission of Inquiry appointed to examine the complaint filed by the Government of Ghana was as follows: 'I solemnly declare that I will honourably, faithfully, and conscientiously perform my duties and exercise my powers as a member of the Commission appointed by the Governing Body of the International Labour Office in pursuance of Article 26 of the Constitution of the I.L.O. to examine the complaint filed by the Government of Ghana concerning the observance by Portugal of the Abolition of Forced Labour Convention, 1957': *Report of the Commission*, op. cit. (above, p. 328 n. 1), p. 9. See also similar declarations by the members of the Portugal v. Liberia Commission of Inquiry: *Report*, op. cit. (above, p. 328 n. 5), p. 12, and by the members of the Commission of Inquiry on the complaints against Greece: *Report*, op. cit. (above, p. 329 n. 6), p. 78.

any provisions on the procedure to be followed by a Commission of Inquiry. The matter was considered by the Officers of the Governing Body in 1961 as a result of the complaint filed by the Government of Ghana against the Government of Portugal, after which they recommended that the Commission of Inquiry, if appointed, should determine its own procedure, but should 'begin its work by examining the particulars furnished by the Government of Ghana and the observations of the Government of Portugal with a view to determining on what matters it needs fuller information. The Commission will then, through the Director-General, consult the Governments of Ghana and Portugal, but without being bound by the views of either of them, concerning the arrangements necessary to ensure that it has at its disposal thorough and objective information concerning the questions at issue . . .'.<sup>1</sup>

This proposal was approved by the Governing Body,<sup>2</sup> and the Commission of Inquiry, at its first sitting, laid down its procedure, which was designed to give every opportunity to the governments concerned, the governments of neighbouring countries and some governmental international organizations, to submit information about the complaint.<sup>3</sup> At its second sitting, the Commission heard the arguments of the representatives of the governments concerned, and the evidence given by their witnesses, who were examined and cross-examined by the agent and counsel of the Members involved in the complaint.<sup>4</sup> The members of the Commission afterwards visited the territories of Mozambique, Angola and Guinea, 'in order to ascertain whether reasonably specific allegations were supported by current or recent facts'.<sup>5</sup>

The foregoing procedure has been consistently followed in the consideration of complaints by subsequent Commissions of Inquiry, and may now be regarded as an established practice.<sup>6</sup>

(iv) *Jurisdiction of a Commission of Inquiry*. An indication of the nature of the jurisdiction of a Commission of Inquiry may be found in Article 28 of the I.L.O. Constitution, which provides that:

When the Commission of Inquiry has fully considered the complaint, it shall prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken.

Interesting questions arise from this provision. It seems that a Commission of Inquiry is required to carry out the functions in Article 28 once a complaint has been referred to it by the Governing Body. This implies that its jurisdiction is not dependent upon the subsequent consent of the Members or entities involved in the complaint,<sup>7</sup> or on the continued presence or co-operation of any of the parties.<sup>8</sup>

<sup>1</sup> *Report of the Ghana v. Portugal Commission of Inquiry*, op. cit. (above, p. 328 n. 1), p. 7.

<sup>2</sup> *Ibid.*, p. 7.

<sup>3</sup> *Ibid.*, pp. 19-20.

<sup>4</sup> Altogether thirty-one witnesses were called and over 1,500 questions were put to them. Portugal alone produced twenty-two of the witnesses: see *ibid.*, pp. 19-20.

<sup>5</sup> Governing Body, 150th Session (November 1961), *Minutes*, p. 96.

<sup>6</sup> For the procedure applied in the complaint from Portugal, see *Report of the Commission*, op. cit. (above, p. 328 n. 5), pp. 68-74; complaint on Greece: *Official Bulletin of the I.L.O.*, vol. 54 (1971), no. 2, pp. 13-20; and complaint on Chile: Governing Body, 194th Session (2-15 November 1974), Doc. G.B. 194/4/21, pp. 3-5.

<sup>7</sup> Cf. Jenks, 'The International Protection of Freedom of Association for Trade Union Purposes', *Recueil des cours*, 87 (1955-I), p. 40.

<sup>8</sup> Consequently, a Commission of Inquiry is competent to consider a complaint even if the parties refuse to give evidence, or withdraw from the proceedings of the Commission: the



The first duty of a Commission of Inquiry, in accordance with the provisions of Article 28, is fully to consider the complaint referred to it. The question arises whether there may be circumstances in which it would be unable to discharge this duty. Could a Commission of Inquiry summarily dismiss a complaint as a result of preliminary objections made by one of the parties involved? Practice provides some answers to this question.

During the proceedings of the Commission of Inquiry appointed to consider the complaint filed by the Government of Ghana in 1961, the Government of Portugal contended at various stages that there was no case to answer, as the accusation made had not been 'supported by concrete facts or by any evidence whatsoever'.<sup>1</sup> The Government of Ghana maintained that it did not have to substantiate the complaint, as it had no access to Angola and no means of protecting its sources of information from reprisals, but that it was the responsibility of the Commission to ascertain whether or not the complaint was justified.<sup>2</sup>

The Commission rejected the contention that the I.L.O. had absolute responsibility to make a full investigation of a complaint, and stated that 'unless the complainant government makes a *prima facie* case, it would appear to be entirely within the discretion of the Organization whether to pursue the matter further . . . A Commission exercising the functions specified in the Constitution would appear to have a similar discretion at each successive stage of its proceedings. . . .'<sup>3</sup> The Commission nevertheless decided that the task entrusted to it by the Governing Body and the public importance of the issues raised by the complaint justified it in pursuing the matter further.<sup>4</sup>

The practice of a Commission of Inquiry on preliminary objections may also be illustrated from another case. In accordance with a directive of the Governing Body, the Commission appointed in 1961 to consider the complaint filed by Portugal began its work by examining a claim made by Liberia that the complaint should be summarily dismissed as baseless on the ground that it was motivated by political reasons; that it was in the nature of a reprisal by Portugal for action taken by Liberia in the Security Council and General Assembly of the United Nations; and that its submission was inappropriate as proceedings were pending on the complaint filed by the Government of Ghana against the Government of Portugal.<sup>5</sup>

The Commission rejected these contentions. It stated that the complaint could not be regarded as a reprisal or as inappropriate since it represented the exercise by Portugal of a constitutional right under the I.L.O. Constitution;<sup>6</sup> that it was not concerned with any political aspects which the matter might have, as the task entrusted

Government of Greece withdrew from the proceedings of the Commission appointed to consider the complaint against it because of the decision of the Commission to hear a witness objected to by the Government. Despite the withdrawal, the Commission carried on with its proceedings, heard the witness concerned in the absence of the Greek Government representatives, and made its findings and recommendations: *Official Bulletin of the I.L.O.*, vol. 54 (1971), no. 2, pp. 19-20.

<sup>1</sup> *Report of the Ghana v. Portugal Commission of Inquiry*, op. cit. (above, p. 328 n. 1), p. 355, and p. 353.

<sup>2</sup> *Ibid.*, p. 352.

<sup>3</sup> *Ibid.*, pp. 352 and 353.

<sup>4</sup> *Ibid.*, p. 353.

<sup>5</sup> *Report of the Portugal v. Liberia Commission of Inquiry*, op. cit. (above, p. 328 n. 5), p. 243.

<sup>6</sup> The Commission concluded, employing the words used by the International Court of Justice in the *South West Africa* cases (*Ethiopia v. South Africa*, *Liberia v. South Africa*) (Preliminary Objections), *I.C.J. Reports*, 1962, p. 343, that 'the language used by the Constitution of the I.L.O. to create and define their constitutional right . . . gives rise to no ambiguity and permits no exception': *Report of the Commission*, op. cit. (above, p. 328 n. 5), pp. 244-5.



to it was 'to examine judicially whether or not there has been or is a failure by Liberia to secure the effective observance of the provisions of the Forced Labour Convention, 1930 (No. 29)';<sup>1</sup> and that in taking this view, it had been guided by a series of decisions of the International Court of Justice in cases in which it was contended that it should decline to give an Advisory Opinion by reason of the political nature of the questions on which its opinion was requested, and notably by the decisions of the Court in the *Conditions of Admission of a State to Membership of the United Nations (Article 4 of the Charter)* case,<sup>2</sup> and the *Certain Expenses of the United Nations* case.<sup>3</sup>

The inferences which may be drawn from this practice are that a Commission of Inquiry may find it impossible to discharge its functions under Article 28 in cases where the complainant fails to submit any evidence in support of the complaint, and no such evidence can be obtained by the Commission; and, further, that in any case a complaint may be summarily dismissed where a *prima facie* case is not made out against the Member which is alleged to be in breach of a Convention to which it is a party.

(v) *Development of law and precedent.* The provision of Article 28 that a Commission of Inquiry should prepare a report embodying its findings 'on all questions of fact' suggests that it is not expected to deal with questions of law and politics. While it is possible, and indeed desirable, that a Commission of Inquiry will not concern itself with political questions,<sup>4</sup> it seems difficult to distinguish findings of fact from those of law in these cases. In order to establish whether a Member is in breach of its legal obligations, a Commission of Inquiry will have to examine the facts on which the complaint is based, as well as the nature of the Member's obligations under the relevant Convention. In doing so, the Commission will be dealing with questions both of fact and of law.<sup>5</sup>

These views are confirmed by the practice in the I.L.O. In 1961, the Commission of Inquiry appointed to examine the complaint filed by the Government of Ghana had to consider the nature of the constitutional obligation of Members of the I.L.O. to 'take such action as may be necessary to make effective the provisions of Conventions which they have ratified',<sup>6</sup> and stated that 'while only the International Court of Justice can pronounce authoritatively on the matter the Commission construes this obligation as being an obligation to make the provisions of the Convention effective in law and in fact . . .'.<sup>7</sup>

During the proceedings of the Commission of Inquiry appointed to consider the complaint filed by the Government of Portugal against the Government of Liberia, the representative of the latter contended that none of the legislation of Liberia constituted

<sup>1</sup> *Report of the Portugal v. Liberia Commission of Inquiry*, op. cit. (above, p. 328 n. 5), p. 245.

<sup>2</sup> *I.C.J. Reports*, 1947-8, p. 61.

<sup>3</sup> *I.C.J. Reports*, 1962, pp. 155-6.

<sup>4</sup> The Commissions of Inquiry have consistently stated that it is not their duty to deal in any way with questions concerning the political situation in the territories of a Member. In the words of the Commission of Inquiry appointed to examine the complaint filed by the Government of Portugal 'while the question referred to the Commission may be . . . "intertwined with political questions", the task of the Commission is to examine judicially, without regard to such considerations, whether or not the obligations of the Constitution and Convention are being carried out': see *Report of the Portugal v. Liberia Commission of Inquiry*, op. cit. (above, p. 328 n. 5), p. 245.

<sup>5</sup> The determination of preliminary objections also involves dealing with questions of law: see above, pp. 333-4.

<sup>6</sup> Article 19 (5) (d) and Article 26 (1) of the I.L.O. Constitution.

<sup>7</sup> These views were confirmed by the Commission of Inquiry appointed to examine the complaint filed by the Government of Portugal against the Government of Liberia: see *Report of the Commission*, op. cit. (above, p. 328 n. 5), p. 158.

a failure to secure the effective observance of the relevant Convention on the grounds that, by Liberian law, the provisions of the Convention prevailed over inconsistent provisions of the legislation; that they operated as an implied repeal of all such provisions prior in date to the ratification; and that taken together with the constitutional guarantee of life, liberty and property provided for in Article 8 (1) of the Constitution of Liberia, they rendered unconstitutional, and therefore inoperative, all national legislative provisions subsequent in date to the ratification of the Convention.<sup>1</sup>

The Commission rejected these contentions. In its opinion, an implied repeal of legislation inconsistent with the requirements of the Convention was not, and in the nature of the case could not be, a sufficient fulfilment of the obligations embodied in the Convention.<sup>2</sup> Furthermore, the Commission stated that it could not accept as convincing the contention that Liberian legislation subsequent in date to the ratification of the Convention was *ultra vires* and invalid by reason of its inconsistency with the Convention. In the words of the Commission:

It is not open to any government to contend in international proceedings relating to an alleged failure to give effect to its obligations under an International Labour Convention that the enactment on its initiative or with its consent of legislation apparently inconsistent with the Convention did not in fact involve any such failure because the legislation in question was constitutionally invalid by reason of the inconsistency.<sup>3</sup>

Finally, during the proceedings of the Commission of Inquiry appointed in 1969 to examine the complaint made against Greece, the Greek representative argued that although Greece had ratified the Conventions in question and had assumed an obligation under Article 8 of Convention No. 87 to ensure that the law of the land did not impair the guarantee provided for in the Convention, Greece had not undertaken to repeal article 91 of its Constitution of 1952 relating to the state of emergency; that the Conventions did not, and could not, require the repeal of such provisions, which were common in national constitutions; that the state of emergency was as familiar a concept in public law as that of *force majeure* in private law, and that granted that the law should conform with the Constitution and that the Government was the sole judge of the need to proclaim a state of emergency, the safeguards required by the Convention were not inviolate and their suspension, however regrettable, had been in no way arbitrary.<sup>4</sup>

The Commission rejected these arguments. It stated that although in the law of Greece, conformity with the Constitution would make the Government the sole judge of the need to proclaim a state of emergency, that was not the effect in international law. It took the view that it was an accepted principle of international law that a State could not rely on the terms of its national law, or otherwise invoke the concept of national sovereignty, to justify non-performance of an international obligation, and that any doubt concerning the extent of such obligations should be determined by exclusive reference to the relevant principles of international law, whether made express by the parties to a treaty or derived from another source of international law, in particular custom and general principles of law. The relevant principles of international law applicable to the case were contained in the Conventions ratified by Greece, and none of the Conventions contained any provisions which allowed the possibility of a plea

<sup>1</sup> *Report*, op. cit. (above, p. 328 n. 5), p. 158.

<sup>2</sup> *Ibid.*, p. 160.

<sup>3</sup> *Ibid.*, p. 161.

<sup>4</sup> *Report of the Commission appointed to examine the complaint against Greece*, 14 October 1970: *Official Bulletin of the I.L.O.*, vol. 54, Special Supplement (1971), pp. 24-5; see also p. 80.



of emergency, as an exception to the obligations which arose under the Convention, on the terms thereof.<sup>1</sup>

The Commission further pointed out that the position of pleas of emergency or necessity in international custom could be said to correspond essentially to the place given to pleas of *force majeure* in national systems of law. Such a plea generally required a showing of 'irresistible force of circumstances', and both the general principles of law derived from national practice and international custom were based on the assumption that the non-performance of a legal duty could be justified only where there was impossibility of proceeding by any method other than the one contrary to the law. It should be shown also that the action sought to be justified under the plea was limited, both in extent and in time, to what was immediately necessary.<sup>2</sup>

The views expressed by the Commissions of Inquiry in these three cases were not rejected either by the Members involved in the complaints or by other Members. As such, they now appear to constitute established principles on the relevant questions, and may be relied upon in the future.<sup>3</sup>

(vi) *Binding effect of recommendations of a Commission of Inquiry.* The final duty of a Commission of Inquiry is to prepare a report embodying its findings and recommendations, where appropriate, as to the steps which should be taken to meet the complaint and the time within which they should be taken. A question arises, however, as to the binding effect of these recommendations. An answer to it may be found in the I.L.O. Constitution. Article 29 (1) requires the Director-General to communicate the report of the Commission of Inquiry to the Governing Body and to each of the governments involved in the complaint, and to publish the report. Article 29 (2) provides that each of these governments must inform the Director-General 'within three months' whether or not it accepts the recommendations contained in the report, and, if not, whether it proposes to refer the complaint to the International Court of Justice.

The effect of these provisions is that the findings and recommendations of a Commission of Inquiry are not binding upon the Members to which they apply until at least three months from the date on which they are communicated to such Members. Within this period, however, the governments of the Members concerned must inform the Director-General whether or not they accept the findings and recommendations. If they accept them, they become bound to carry them out within the time specified by the Commission of Inquiry. If they do not accept them, they must also state whether or not they propose to refer the complaint to the International Court of Justice.

If a Member proposes to refer the matter to the Court, the recommendations will not give rise to any binding obligations until the complaint is decided by the Court. If a Member fails to state whether it proposes to refer the complaint to the Court, it may be presumed to have accepted the recommendations, and may be bound to implement them within the time specified by the Commission of Inquiry.

A question may arise as to the position of a Member which expressly rejects the findings and recommendations of a Commission of Inquiry and does not propose to refer the complaint to the International Court of Justice. Since the provisions of Article 29 (2) permit a Member to refer a complaint to the Court 'if it does not accept

<sup>1</sup> *Report*, op. cit. (above, p. 335 n. 4), pp. 25-6.

<sup>2</sup> *Ibid.*

<sup>3</sup> Some of the findings of the *Ghana v. Portugal* Commission of Inquiry were adopted and applied by the *Portugal v. Liberia* Commission of Inquiry: see *Report* of this Commission, op. cit. (above, p. 328 n. 5), p. 158; and some were relied upon by Judge Jessup as a basis for certain views expressed in his separate opinion in the *South West Africa* cases (*Ethiopia v. South Africa*; *Liberia v. South Africa*), *I.C.J. Reports*, 1962, pp. 427-8.



the recommendations of the Commission of Inquiry', its failure to exercise this constitutional right will justify the presumption that it has agreed to carry out the recommendations—even though it does not approve of them<sup>1</sup>—and will be bound to implement them.

(vii) *Appeals against recommendations of a Commission of Inquiry.* If a Member involved in a complaint does not accept the recommendations of a Commission of Inquiry, it has a right under Article 29 (2) of the I.L.O. Constitution to refer the complaint to the International Court of Justice for decision. The Member must, however, inform the Director-General of its proposal to do so, within three months from the date on which it receives the report of the Commission of Inquiry. Although the Constitution does not contain provisions as to the time within which the Member must refer the complaint to the Court, it seems that this should be done within a reasonable time, for instance three months after the Member informs the Director-General of its proposal.

The proceedings before the International Court of Justice appear to constitute a new hearing of the complaint in which all the relevant evidence will be considered by the Court. After the proceedings, the Court may affirm, vary or reverse the findings or recommendations, if any, of the Commission of Inquiry.<sup>2</sup> The decision of the Court in this respect is final and binding on the Members involved in the complaint.<sup>3</sup>

(viii) *Failure to carry out recommendations of a Commission of Inquiry or a decision of the International Court of Justice.* Where a Member is under an obligation to carry out the recommendations of the Commission of Inquiry or a decision of the International Court of Justice, as the case may be, but fails to do so, Article 33 of the I.L.O. Constitution authorizes the Governing Body to 'recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith'.

These provisions, which have never been resorted to, replaced the provisions in the Constitution which were in force from 1919 to 1946, under which a Commission of Inquiry was empowered to indicate 'the measures, if any, of an economic character which it considers to be appropriate and which other governments would be justified in adopting against a defaulting government', and also that 'any other Member may take against that Member the measures of an economic character indicated in the report of the Commission or in the decision of the Court as appropriate to the case'.<sup>4</sup> These provisions, which also were never applied, were omitted when the I.L.O. Constitution was amended in 1946, partly on the grounds that it was improbable that the International Court of Justice would consider it consistent with its judicial character to indicate measures of an economic character which other governments would be justified in adopting as against a defaulting government, and partly on the ground that it should not be left to the discretion of a Commission of Inquiry consisting of persons acting in a personal capacity on behalf of the Governing Body to indicate such economic measures.<sup>5</sup>

The fact which thus emerges, and which is supported by the present provisions of

<sup>1</sup> Thus a distinction may be made between acceptance of the recommendations and compliance with them: a Member may not accept the recommendations, but may nevertheless comply with them.

<sup>2</sup> Article 32 of the I.L.O. Constitution.

<sup>3</sup> Article 31 of the I.L.O. Constitution.

<sup>4</sup> See Articles 418–19 of the Treaty of Versailles and Articles 32–3 of the I.L.O. Constitution before 1946.

<sup>5</sup> See Jenks, *The Prospects of International Adjudication*, pp. 696–7. Also: 29th Session of the Conference (1946), *Report II (I), Constitutional Questions, Part I: Report of the Conference Delegation on Constitutional Questions*, pp. 55–60.

the I.L.O. Constitution, is that neither a Commission of Inquiry nor the International Court of Justice can validly recommend the application of measures of an economic character against a Member which fails to carry out the recommendations of a Commission of Inquiry or the decision of the Court, as the case may be. This does not mean, however, that no such measures can be taken against a Member. The provisions of Article 33 that the Governing Body may recommend 'such action as it may deem wise and expedient' leaves the matter to the discretion and wisdom of that body. Thus, the Governing Body may recommend to the Conference any action, whether of an economic character or otherwise, provided it deems such action 'wise and expedient' to secure compliance with the relevant recommendations or decision.

## V. CONCLUSIONS

It has been shown that questions and disputes relating to the interpretation of the I.L.O. Constitution and Conventions are referred to the International Court of Justice for decision, and that representations and complaints against Members of the I.L.O. are determined by the Governing Body and a Commission of Inquiry. Thus, the judicial function in the I.L.O. consists primarily in the settlement of disputes between Members and between them and other entities.<sup>1</sup> Since these disputes are determined in most cases by the International Court of Justice, or a Commission of Inquiry whose composition and procedure are similar to those of a court of law, it is submitted that the judicial function in the I.L.O. is exercised primarily by judicial organs.<sup>2</sup>

Professor Daniel Vignes asserts that, while a Commission of Inquiry probably possesses a 'caractère judiciaire', it is doubtful whether it possesses a 'caractère juridictionnel' because it is not called upon to decide a dispute between States and cannot lay down the law.<sup>3</sup> But the practice examined above shows that a complaint normally involves a dispute between two parties; a Commission of Inquiry can formulate legal principles which may be relied upon or applied in the future; and its recommendations are binding in all but the one case where the complaint is subsequently referred to the International Court of Justice.

The fact that the I.L.O. Constitution authorizes certain action to be taken against Members for failure to carry out the recommendations of a Commission of Inquiry or a decision of the International Court of Justice, as the case may be, may suggest that the purpose of the judicial function in the Organization is to apply sanctions against 'offending' Members. This is not necessarily the case. The constitutional provisions which authorize action—punitive or otherwise—to be taken against a Member, have

<sup>1</sup> It has been suggested by Daniel Vignes that a distinction ought to be made between a complaint and a dispute, especially as the former is merely a denunciation of what the complainant believes to be a contravention of the law: 'Procédure internationale d'enquête', *Annuaire français de droit international*, 1963, pp. 442-3. It seems difficult to maintain such a distinction since, as has been demonstrated by the present study, a complaint normally gives rise to a disagreement, conflicts of views and, in many cases, contentious proceedings, between the parties. Therefore to accept that a complaint is not a dispute will be tantamount to an admission that a civil action in municipal law, which normally originates from the action of one party, is not a dispute between the contending parties.

<sup>2</sup> The judicial character of a Commission of Inquiry was affirmed by the 'Officers' of the Governing Body in the recommendations relating to the *Ghana v. Portugal* and *Portugal v. Liberia* Commissions (see above, p. 331 n. 2); by the *Ghana v. Portugal* Commission in 1961 (see *Report*, op. cit. (above, p. 328 n. 1), p. 351); by the *Portugal v. Liberia* Commission (see *Report*, op. cit. (above, p. 328 n. 5), pp. 242-3); and by Judge Jessup in his Separate Opinion in the *South West Africa* cases, *I.C.J. Reports*, 1962, pp. 427-8.

<sup>3</sup> Daniel Vignes, 'Procédure internationale d'enquête', op. cit. (above, n. 1), pp. 458-9.



never in fact been used. Furthermore, it seems apparent from the terms of the recommendations made by Commissions of Inquiry that their object is not to find governments 'guilty' for the exclusive purpose of formally recording their guilt, but to indicate measures which could secure the fuller observance of the provisions of the I.L.O. Constitution and Conventions.<sup>1</sup> Thus, one of the significant effects of the exercise of the judicial function in the I.L.O. is the promotion of fuller and more effective application of the Constitution and Conventions, thereby presumably contributing to the improvement of better conditions of work and the better attainment of the fundamental purposes of the Organization.

In recent years, international lawyers have advanced various reasons for the reluctance of States and international organizations to submit cases to the International Court of Justice.<sup>2</sup> But one reason may be the availability of internal judicial machineries in international organizations for the settlement of disputes. So far as the I.L.O. is concerned, no case has been submitted to the International Court since 1932, but frequent use is being made of the International Labour Office, the Governing Body, and Commissions of Inquiry, for the interpretation of legal instruments, or the determination of disputes. The use of the internal judicial processes of the I.L.O.—which have the advantage of being less expensive and less time-consuming than proceedings before an International Court—may have contributed to a reluctance to submit disputes arising within the Organization to the International Court of Justice.

The determination in a judicial manner of disputes which arise in the I.L.O. may have another important effect. It has been pointed out by Sir Francis Vallat that the effect of reference of a dispute to a judicial body 'is normally an immediate drop in the diplomatic temperature';<sup>3</sup> and as Dr. C. W. Jenks observed, an 'authoritative finding that . . . allegations are not well-founded published in an objective report which examines in a judicial manner the facts of the case and the arguments advanced is a real contribution to the elimination from international relations of tensions arising from unjustified allegations'.<sup>4</sup> Since the records of the I.L.O. show that no further controversy arose with respect to the disputes which were determined by the International Court or a Commission of Inquiry, it may be claimed that the exercise of the judicial function in the I.L.O. contributes to the elimination of tension and conflict between Members, and to the attainment of the fundamental purposes of the Organization.

Finally, recommendations of a Commission of Inquiry and decisions of the International Court of Justice are in most cases binding on Members of the I.L.O. The decisions of the Court and pronouncements of Commissions of Inquiry embodying legal principles, which are not binding *per se*, may receive general acceptance, and may constitute precedents for the future. This means that the 'decisions' of these judicial organs may constitute either binding law for the Members of the I.L.O., or a source for the development of the law governing their relationship. Since Members of the Organization are also members of the international community, it would appear that

<sup>1</sup> Cf. Jenks, 'The International Protection of Freedom of Association for Trade Union Purposes', *op. cit.* (above, p. 332 n. 7), pp. 96-7.

<sup>2</sup> See, for instance, Jenks, *The Compulsory Jurisdiction of International Courts and Tribunals* (1957), pp. 127-8; Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council', *American Journal of International Law*, 64 (1970), p. 4.

<sup>3</sup> Vallat, 'The Peaceful Settlement of Disputes', in *Cambridge Essays in International Law* (1965), p. 170.

<sup>4</sup> Jenks, 'The International Protection of Freedom of Association for Trade Union Purposes', *op. cit.* (above, p. 332 n. 7), p. 98.



the exercise of the judicial function in the I.L.O. may have the effect of contributing to the development of law in the international community. This contribution may not be precisely in the same form as that made by national courts to the development of municipal law, but as Dr. C. W. Jenks has pointed out 'the rough jurisprudence of nations, while still rough by the standards of municipal law, is being progressively refined by legislation<sup>1</sup> and judicial methods which, while in many respects different from the more developed methods of municipal law, fulfil the same basic functions in the development of the law'.<sup>2</sup> The facts which emerge from the present study appear to demonstrate the accuracy of this statement.

<sup>1</sup> For an examination of the legislative function in the I.L.O., see Ebere Osieke, *The Constitutional Character of International Organisations*, pp. 47-90; McMahon, 'The Legislative Techniques of the I.L.O.', this *Year Book*, 41 (1965-6), pp. 1-102.

<sup>2</sup> Jenks, 'Craftsmanship in International Law', *American Journal of International Law*, 50 (1956), pp. 39-40.

# DECISIONS OF BRITISH COURTS DURING 1974-1975 INVOLVING QUESTIONS OF PUBLIC AND PRIVATE INTERNATIONAL LAW

## A. PUBLIC INTERNATIONAL LAW\*

*Extradition—German–British Extradition Treaty 1872—provisional arrest—interpretation—procedure*

*Case No. 1. Government of the Federal Republic of Germany v. Sotiriadis*, [1975] A.C. 11; [1974] 1 All E.R. 692; [1974] 2 W.L.R. 253, H.L. reversing D.C. *sub. nom. R. v. Governor of Pentonville Prison, ex parte Sotiriadis*, [1975] A.C. 1; [1974] 1 All E.R. 504. This case involved a nice question of construction of a procedural provision in the British–German Extradition Treaty of 1872.<sup>1</sup> Article XII of that treaty, which had been ‘reapplied’ to British–West German Relations by a treaty of 23 February 1960,<sup>2</sup> reads as follows:

If sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive, he shall be set at liberty.

The normal procedure for the apprehension of a fugitive for the purposes of extradition is laid down by Section 7 of the Extradition Act 1870:

A requisition for the surrender of a fugitive criminal in any foreign State, who is in or suspected of being in the United Kingdom, shall be made to a Secretary of State by some person recognized by the Secretary of State as a diplomatic representative of that foreign State. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal . . .

Section 8 of the Act goes on to provide that:

A warrant for the apprehension of a fugitive criminal . . . who is in or suspected of being in the United Kingdom, may be issued—

1. by a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England; and
2. by a police magistrate or any justice of the peace in any part of the United Kingdom, on such information or complaint and such evidence or after such proceedings as would in the opinion of the person issuing the warrant justify the issue of a warrant if the crime had been committed or the criminal convicted in the part of the United Kingdom in which he exercises jurisdiction . . .

There are thus two methods by which a fugitive may be arrested; either under Section 8 (1) pursuant to an order of a Secretary of State made under Section 7, or under Section 8 (2) on an information or complaint without such an order. It was by the latter means, commonly known as a provisional warrant, that Ioannis Sotiriadis was apprehended on 5 April 1973, on a charge of forgery committed in the Federal Republic

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<sup>1</sup> *British and Foreign State Papers*, vol. 62, p. 5.

<sup>2</sup> *United Nations Treaty Series*, vol. 385, p. 39; *United Kingdom Treaty Series*, No. 70 (1960). (Cmnd. 1200). The Federal Republic of Germany (Extradition) Order 1960, Article 2 provides that the Extradition Act 1870 is to apply ‘under and in accordance with’ the treaty: see S.I., 1960 (II), p. 1575.

of Germany. He was then detained in Pentonville Prison and remanded in custody from time to time, until 4 June 1973. On 2 June 1973 the Secretary of State issued an order pursuant to Section 7 stating that a requisition had been made for the extradition of Sotiriadis on charges of forgery and obtaining property by deception.<sup>1</sup> Duly authenticated depositions in accordance with Section 15 of the Act were received at the Foreign Office on 4 June 1973. Unofficial translations were handed to the Bow Street magistrate on the same day, but the authenticated documents were only received by the magistrate on 6 June 1973, two months and one day after the apprehension of Sotiriadis under the provisional warrant. The authenticated documents were sufficient to make out a case against Sotiriadis in respect of the offences charged, but it was not disputed that sufficient evidence, in admissible form, did not reach the magistrate before 6 June 1973.<sup>1</sup> The question that arose, on Sotiriadis' application for *habeas corpus*, was whether sufficient evidence had been 'produced within two months from the date of the apprehension' under Article XII of the treaty. This question involved two distinct problems of interpretation: firstly, whether apprehension under a provisional warrant constituted 'apprehension' under the treaty,<sup>2</sup> and secondly, whether production to the Foreign Office, rather than to the magistrate, was sufficient. If Sotiriadis failed on either point his detention was proper.

On the first point the Divisional Court held that apprehension under a provisional warrant did constitute apprehension for the purpose of the treaty, so that the two months began to run from 5 April 1973. Lord Widgery C.J. (with whom Thompson and Caulfield JJ. agreed) was much influenced by the argument that 'nothing following April 5 . . . could conceivably be described as apprehension of the criminal'.<sup>2</sup> He further held that 'production' for the purposes of Article XII meant

production to the magistrate and not production to the government as such . . . (B)y the time one reaches article IX of the treaty the warrant to arrest is issued and the magistrate is seised of the matter to decide whether sufficient evidence has been shown. It seems to me that when one speaks in neutral terms in article XII of 'producing' evidence in that context it must mean producing evidence to the magistrate.<sup>3</sup>

The point was not taken that, even if the applicant's detention after 5 June on the forgery charge was improper, his detention on the false pretences charge might not have been, since the earliest date at which he could have been apprehended on that charge was 2 June.<sup>4</sup> In the event, *habeas corpus* was granted, and the Government of the Federal Republic appealed. The House of Lords unanimously upheld the appeal.

On the first point it held that 'apprehension' under Article XII meant apprehension under a requisition pursuant to the treaty, and not apprehension under a provisional warrant. Unlike a number of extradition treaties,<sup>5</sup> the 1872 treaty made no mention of the provisional arrest procedure, and, as Lord Wilberforce pointed out,

<sup>1</sup> Counsel for the respondent in the House argued that the evidence was in any case insufficient to justify committal. The argument was rejected: see *per* Lord Diplock, [1975] A.C. 11 at pp. 29-30.

<sup>2</sup> *Ibid.* at p. 8.

<sup>3</sup> *Ibid.* at p. 10.

<sup>4</sup> It is, as Lord Widgery conceded, quite possible for a person in custody in respect of one matter to be 'apprehended' for the purposes of the Extradition Act on another matter: *R. v. Weil*, (1882) 9 Q.B.D. 701; cf. *Athanassiadis v. Government of Greece (Note)*, [1971] A.C. 282. Cf. also *In re Bluhm*, [1901] 1 Q.B. 764.

<sup>5</sup> For a useful survey see S. D. Bedi, *Extradition in International Law and Practice* (Rotterdam, 1966), pp. 117-28. The U.K.-Swiss Treaty of 26 November 1880 (*British and Foreign State Papers*, vol. 71, p. 54) considered in *In re Castioni*, [1891] 1 Q.B. 149, did provide for arrest on provisional warrant. See also the European Convention on Extradition, 1957, Article 16: *United Nations Treaty Series*, vol. 359, p. 273, and Shearer, *Extradition in International Law* (Manchester, 1971), pp. 200-2.



it would seem to be contrary to the intention of the treaty, and unworkable, that the two months' period should run from a date which the foreign government may have had no part in selecting and on which the charges relied on by the foreign government had not been established.<sup>1</sup>

Moreover, the 1870 Act contained safeguards against unreasonably lengthy provisional detention,<sup>2</sup> even if, in practice, an incorrect procedure of remand from time to time, without the fixing of a definite period of custody, had been followed.<sup>3</sup> On this analysis the 'apprehension' of the respondent under Article XII occurred on 4 June when he was remanded in custody pursuant to the requisition of a Secretary of State.<sup>4</sup> Only Lord Cross felt any doubt on this point:

[T]he treaty has now been in force for 100 years and . . . it has apparently always been assumed by those responsible for applying its provisions in this country that where the arrest was under a provisional warrant the two month period ran from that arrest . . . Whatever may be the law with regard to private contracts there is no doubt that the conduct of the contracting parties after the conclusion of a treaty has 'a high probative value' as to their intention at the time of its conclusion (see McNair, *Law of Treaties* (1961), p. 424) and I cannot help doubting whether it is right for us today to jettison the accepted construction in favour of what is, I readily concede, so far as words go, the preferable construction. I cannot help wondering whether [the new construction] may not raise doubts as to the meaning of other treaties couched perhaps in somewhat different language and perhaps referring in terms to provisional warrants where hitherto no doubts have been felt . . . But as all your Lordships are clearly of opinion that the construction suggested . . . ought to be adopted notwithstanding the length of time during which the other view has held the field I am not prepared to register a dissent.<sup>5</sup>

With regard to the argument for interpretation by subsequent conduct of the parties, it may with respect be doubted whether the 'agreement of the parties regarding (the) interpretation' of the 1872 treaty had been established here.<sup>6</sup> The interpretation of other extradition treaties, which was a second source of doubt, will presumably depend on the precise terms of each treaty. Where a treaty provides both a time limit for the production of evidence, and a system of provisional arrest, then the term 'apprehension' may well be interpreted to include arrest under a provisional warrant.<sup>7</sup>

The second point—that is, whether production had to be to the court, or merely to the government—was rather more difficult. A majority of the House thought that production to the extraditing government was sufficient for the purpose of Article XII.<sup>8</sup> Lord Wilberforce adduced perhaps the strongest argument for that position:

I do not think that it can have been intended that where, as between governments, the necessary evidence has been delivered within the treaty period, the requesting government is to lose its treaty rights on account of delay in transmission to the requested state's courts, and it does not logically follow from the fact that it is the courts which have to

<sup>1</sup> [1975] A.C. 11 at p. 18.

<sup>2</sup> Where a provisional warrant is issued, a Secretary of State must be notified, and may order the warrant to be cancelled: Article 8. Further, the magistrate must fix a reasonable time within which an order of a Secretary of State pursuant to Article 8 (1) must be received.

<sup>3</sup> Cf. the remarks of Lord Diplock, [1975] A.C. 11 at pp. 28-9; Lord Kilbrandon at pp. 35-6.

<sup>4</sup> *Per* Lord Diplock at p. 28.

<sup>5</sup> At pp. 31-2.

<sup>6</sup> Cf. Vienna Convention on the Law of Treaties, Article 31 (3) (b).

<sup>7</sup> [1975] A.C. 11 *per* Lord Wilberforce at p. 18; Lord Diplock at pp. 27-8; Lord Kilbrandon at p. 37.

<sup>8</sup> *A fortiori* production direct to the court, which does sometimes occur, will also be sufficient.

pronounce on the sufficiency of the evidence that the date of production is to be the date of production to the court.<sup>1</sup>

On this point Lord Diplock (with whose judgment Lord Simon of Glaisdale concurred) dissented: in his view

evidence for the extradition, as distinct from evidence for the arrest, is not produced until it is received at Bow Street magistrates' court though this may be before it is tendered in open court.<sup>2</sup>

His Lordship did not set out the reasons for this view. However, in the interpretation of a treaty provision designed to protect the person accused, and which has been implemented so as to become in effect part of the local law, it might well have been argued that the injustice to an accused who has no opportunity of testing the sufficiency of the evidence against him is greater than the potential injustice to a requesting State caused by delay in the requested State's forwarding evidence to the court. Moreover, the requesting State would always be able to comply with the treaty requirements by producing the evidence direct to the court.

*Fugitive Offender—'offence of a political character'—trial by special tribunal*

*Case No. 2. R. v. Governor of Winson Green Prison, Birmingham, ex parte Littlejohn*, [1975] 1 W.L.R. 893; [1975] 3 All E.R. 208, D.C. It cannot be often that a fugitive offender, having been returned to the requisitioning State, tried, and convicted, has an opportunity to re-argue the original rendition, on the ground that the trial itself demonstrated the political nature of the offence. Such was the case here. Kenneth Littlejohn was one of a gang with Irish Republican Army connections involved in an armed bank robbery in the Republic of Ireland in 1972. He was subsequently apprehended in Britain and returned to the Republic; his argument that the political motives for the crime, and his alleged connection with the British Government, made the offence one of a political character, and so exempt from rendition under Section 2 (2) (a) of the Backing of Warrants (Republic of Ireland) Act, 1965, was rejected.<sup>3</sup> Littlejohn was then tried by a special criminal court set up under the Irish Offences against the State Act, 1939, convicted, and sentenced to twenty years imprisonment.

Some nine months later he escaped from prison in the Republic, and was subsequently apprehended in Britain. A magistrate ordered his return to the Republic on a warrant alleging gaolbreaking. Littlejohn applied to the Divisional Court for *habeas corpus*, relying on this occasion on Section 2 (2) (b) of the 1965 Act, which precludes rendition if:

there are substantial grounds for believing that the person named . . . in the warrant will, if taken to the Republic, be . . . detained for another offence, being an offence of a political character . . .

The short question then was whether the trial by special court made the original offence one of a political character. That this might, in some cases, have been so Lord Widgery C.J. seems to have conceded, since he regarded the fact of the trial by special court as sufficient 'fresh material' to justify reconsideration of the 1973 decision.<sup>4</sup> The evidence indicated three differences between a special trial under the 1939 Act

<sup>1</sup> [1975] A.C. 11 at p. 18; cf. Lord Cross at pp. 32-3. Lord Kilbrandon agreed 'with some hesitation' (p. 37).

<sup>2</sup> At p. 28.

<sup>3</sup> *In re Littlejohn* (unreported), 19 February 1973, D.C.

<sup>4</sup> [1975] 1 W.L.R. 893 at p. 898. Ashworth and May JJ. agreed.

and normal criminal procedure in the Republic: these were the absence of a jury, more liberal rules of admissibility of evidence in the case of certain offences, and the fact that, under Section 36 (1) of the Act, special courts were only to be established where the government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order in relation to offences of any particular kind.

On the other hand, there was evidence that special courts were sometimes used to try persons for offences quite unrelated to any political motive; and that a prime consideration was the unreliability of juries in the types of case involved.<sup>1</sup> In these circumstances the Divisional Court unanimously refused to see in the use of a special court 'an acknowledgement by somebody that the offence in question is a political offence'.<sup>2</sup> No very explicit reasons were given for this, clearly correct, finding. In any event, in view of the relativity of the notion of 'political offence',<sup>3</sup> it might well have been thought that even trial by special court would not render the offence, or the conflict to which it was, however tenuously, related, one concerning 'the political control or government' of the Republic.<sup>4</sup>

In reaching its conclusion the Divisional Court refused to consider evidence in the form of the *Dáil* Reports for 1939 to the effect that the 1939 Act was intended to cope with offences of a serious political nature, on the grounds that 'parliamentary reports of that kind are not admissible in order to construe an Act of Parliament'.<sup>5</sup> With respect, the objection was misconceived. No issue of the construction of the Irish Act arose, and, even if it had, British courts have generally refused to apply the strict rules of the law of evidence to exclude material relevant to the political nature of an offence.<sup>6</sup> The correct objection to a consideration of the *Dáil* Reports was rather that they could shed no light at all on the motives of the government in 1973 in employing the special court.<sup>7</sup>

*Municipal law—relation to international convention—compulsory sale pursuant to sequestration—whether 'expropriation or nationalization'*

*Case No. 3. Benin v. Whimster*, [1975] 3 W.L.R. 542; [1975] 3 All E.R. 706, C.A. On 13 September 1971 the United Kingdom and Egypt signed an 'Agreement regarding Compensation for British Property, Rights and Interests affected by Arab Republic of Egypt measures of Nationalization and other matters concerning British Property in the Arab Republic of Egypt'.<sup>8</sup> The Agreement provided for payment of some £1,900,000

in settlement of claims for compensation in respect of British properties, rights and interests nationalized before the date of the present Agreement by or under any relevant Arab Republic of Egypt measure.<sup>9</sup>

<sup>1</sup> Cf. at pp. 899-900.

<sup>2</sup> At p. 899; cf. p. 901.

<sup>3</sup> Cf. *Cheng v. Governor of Pentonville Prison*, [1973] A.C. 931; this *Year Book*, 46 (1972-3), pp. 426-7.

<sup>4</sup> *Schtraks v. Government of Israel*, [1964] A.C. 556 *per* Viscount Radcliffe at p. 591; this *Year Book*, 38 (1962), pp. 476-8.

<sup>5</sup> At p. 900.

<sup>6</sup> Cf. *per* Lord Reid, *Schtraks v. Government of Israel*, [1964] A.C. 556 at p. 582.

<sup>7</sup> The Appeal Committee refused leave to appeal to the House of Lords: [1975] 1 W.L.R. at p. 901.

<sup>8</sup> *United Kingdom Treaty Series*, No. 62 (1972) (Cmd. 4995).

<sup>9</sup> Art. II.



The money so provided was set aside for distribution by the Foreign Compensation Commission under the Foreign Compensation (Egypt) Order in Council of 1971.<sup>1</sup> The Order in Council recited the 1971 Agreement, and provided by Article 9 (1) (d) that a claimant under the Order must establish that he

by or under any Egyptian measure . . . has before September 13, 1971, been deprived of title to or enjoyment of the property, and has suffered loss thereby.

Article 2 (2) of the Order defined 'Egyptian measure' as

any of the laws promulgated by the Government of the Arab Republic of Egypt in respect of expropriation or nationalization during the years 1960 to 1964 . . .

This definition differed from that provided for by Article I (3) of the Agreement only by the addition of the words 'expropriation or'.

The property in question here had in fact been transferred to Egyptian ownership in two stages. By Proclamation 138 of 1961, the property was sequestered; that is, its administration was taken over by the State, legal title remaining in the owners. Then, in 1963, pursuant to an executive Decision (No. 14 of 1963) and to legal powers of sale in the administrator, the property was transferred to a State-owned insurance company, at what was alleged to be a substantial under-valuation. The plaintiffs accordingly applied to the Commission for compensation in respect of the under-valuation. The Commission held that their loss was not a deprivation of title by or under laws 'promulgated by the [Egyptian] government in respect of expropriation or nationalization', since the 1961 Proclamation, which was admittedly a law 'promulgated by' that government, was not a law 'in respect of expropriation or nationalization', but merely a law relating to sequestration; while the Decision of 1963, although in effect an expropriation, had not been 'promulgated' under Article 2 (2). The plaintiffs were therefore not entitled to claim under the 1971 Order. On a case stated under the Foreign Compensation Act 1969,<sup>2</sup> the Court of Appeal unanimously reversed the Commission's decision and remitted the case for consideration on its merits.

It was first of all agreed that the Court could, and indeed should, have regard to the terms of the Agreement in construing the Order, although the reasons for this varied. In Lord Denning's view,

when the United Kingdom Government has come to a treaty or agreement or convention with a foreign government, and afterwards a statute or Order in Council is made to implement it, it is of the first importance that they should be construed together and both given the same meaning and effect.<sup>3</sup>

Roskill L.J. reached the same conclusion, but on distinctly more limited grounds:

it would be wrong, as Lord Denning M.R. has said, to construe this Order without regard to the Agreement of 1971. I say that, not because of anything that was said in this court either in *Salomon v. Customs and Excise Commissioners* . . . or in *Post Office v. Estuary Radio Ltd.* . . . but because of the language of this Order. It recites the Foreign Compensation Act 1950; it recites the amendment to that statute in 1969 to which I have already referred; and it then goes on to refer to the Agreement between the two governments . . . Therefore it would be wrong when construing the Order to disregard such

<sup>1</sup> S. I., 1971, No. 2104.

<sup>2</sup> Section 3 (2). Decisions of the Court of Appeal under s. 3 (2) are conclusive and not subject to appeal: s. 3 (8).

<sup>3</sup> [1975] 3 W.L.R. at 550, citing *Salomon v. Customs and Excise Commissioners*, [1967] 2 Q.B. 116; this *Year Book*, 42 (1967), pp. 291-3, and *Post Office v. Estuary Radio Ltd.*, [1968] 2 Q.B. 740; this *Year Book*, 42 (1967), pp. 295-8.

assistance as may be given by reference both to the Agreement of 1971 and to the . . . Acts themselves. I do not rest the view that it is legitimate to have regard to the Agreement of 1971 on the ground that the language of the statutory instrument is ambiguous. A document is not ambiguous merely because it is difficult to construe. A court which prefers one construction of a document to another is not resolving an ambiguity. It is merely determining which of two or more possible constructions of that particular document is correct.<sup>1</sup>

Having regard then to the terms of the Agreement, it became clear that it was intended as a final settlement of a long-standing dispute over compensation for property losses suffered by British nationals in Egypt.<sup>2</sup> The term 'nationalization' therefore had to be extensively, not restrictively, construed, a view supported by the insertion of the words '*expropriation or nationalization*' in the Order.<sup>3</sup> The argument accepted by the Commission that since sequestration was not expressly mentioned in the operative part of either Agreement or Order, the term 'nationalization' must be understood to exclude sequestration, was not tenable in view both of continued disputes over sequestered properties,<sup>4</sup> and of the extensive interpretations of 'nationalization' clearly intended by the Agreement. Nor was it permissible to isolate the Decision of 1963 from the Proclamation of 1961. There was evidence that, on this occasion at least, sequestration was intended by the Egyptian authorities as a permanent divesting of property: it was therefore clear that the property was expropriated under a law promulgated by the Republic in respect of expropriation or nationalization, and the plaintiffs were accordingly entitled to claim.

This conclusion finds further support by reference to Article I (3) (c) of the Agreement, which provided that the term 'British properties, rights and interests' should not include property sequestered under the provisions of Proclamation No. 5 of 1956, unless that property was 'at a later date nationalized'. There seems to be a clear implication that property sequestered under *other* decrees was intended to be the subject of compensation under the Agreement; and it need not follow from the fact that the property was only 'at a later date nationalized' that the original sequestration decree was not a 'law . . . in respect of nationalization', especially where the intention of the authorities was to effect a permanent transfer of the property in question.

#### *Municipal law—relation to international convention*

*Case No. 4. Federal Steam Navigation Co. Ltd. v. Department of Trade and Industry. The Huntingdon*, [1974] 1 Ll.L.R. 520; [1974] 1 W.L.R. 505, H.L.; [1974] 1 Ll.L.R. 8, C.A. Article III of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954,<sup>5</sup> to which the United Kingdom is a party, provides that the discharge from any sea-going tanker within certain prohibited zones of oil or oily mixture shall be prohibited. Article X (2) provides that

. . . If the Government in the territory of which the ship is registered is satisfied that

<sup>1</sup> At pp. 554-5. Ormrod L.J. at p. 558 agreed in the more restrictive view.

<sup>2</sup> At pp. 550-1 *per* Lord Denning; p. 556 *per* Roskill L.J. Cf. the title of the Agreement, the Preamble ('all outstanding problems relating to British property'), and Articles II (1) and (5).

<sup>3</sup> At p. 551 *per* Lord Denning; pp. 554, 556 *per* Roskill L.J.; p. 559 *per* Ormrod L.J.

<sup>4</sup> At pp. 550-1; 555. Cf. the earlier agreements concerning British property in Egypt of 28 February 1959: *United Kingdom Treaty Series*, No. 35 (1959); 7 August 1962, *ibid.*, No. 56 (1962); and 24 April 1967, *ibid.*, No. 106 (1967).

<sup>5</sup> *United Kingdom Treaty Series*, No. 56 (1958) (Cmd. 595); *United Nations Treaty Series*, vol. 327, p. 3.

sufficient evidence is available in the form required by law to enable proceedings against the owner or master of the ship to be taken in respect of the alleged contravention, it shall cause such proceedings to be taken as soon as possible.

Section 1 (1) of the Oil in Navigable Waters Act, 1955, as amended, provides that

If any oil to which this section applies is discharged from a British ship registered in the United Kingdom into a part of the sea which is a prohibited sea area . . . the owner or master of the ship shall . . . be guilty of an offence under this section.

There was no doubt here that the vessel *Huntingdon* had discharged oil into a prohibited sea area within the meaning of Section 1 (1); the only question was whether the owner and the master of the ship could be jointly charged with violating Section 1 (1). By a narrow majority (Lords Reid and Morris dissenting) the House of Lords, affirming the Court of Appeal, held that the word 'or' in Section 1 (1) must be read conjunctively rather than disjunctively, so that both owner and master could be convicted. The 1955 Act recited that it was intended to give effect to the 1954 convention 'and otherwise to make new provision for preventing the pollution of navigable waters by oil'. However, the phrase 'owner or master' also appeared in Article X (2) of the Convention which was therefore of little assistance in construing the Act. In Lord Salmon's words:

I do not consider that any help in construing s. 1 can be derived from the International Convention for the Prevention of Pollution of the Sea by Oil, 1954. I recognize that s. 1 springs from art. X just as s. 5 of the Act springs from art. VII of that Convention. I am prepared to assume (without deciding the point) that s. 1 could have kept within the letter of art. X if it had laid down that in the circumstances postulated the owner alone should be guilty of an offence or if it had laid down that the master alone should be guilty of an offence. It would, I recognize, follow that, on my construction of s. 1, Parliament went further than required by art. X just as it obviously went much further in s. 5 than required by art. VII of the Convention. I do not find this strange or unusual. Australia, for example, took the same course as I think we did, although in somewhat more elegant language, by enacting s. 7 of their Pollution of the Sea by Oil Act No. 11 of 1960. Clearly, if the spirit of the Convention was to ensure that all reasonable steps should be taken to discourage pollution of the sea, it would be clear to Parliament that the most effective means of attaining those ends would be to make the owner and the master each guilty of an offence whenever pollution occurred, or a ship put to sea without complying with some such requirement in respect of equipment as is laid down in s. 5 of the Act.<sup>1</sup>

Lord Wilberforce's judgment was to much the same effect:

Some argument was drawn from the 1954 Convention to give effect to which this Act was passed. It is true that art. X of that Convention contains the words 'owner or master' and historically it is possible that the draftsman of s. 1 (c) of the Act took them, unreflectingly, from this source. But I do not think that any conclusion follows from this. Even if the Convention uses the words 'disjunctively', which is not certain, there is no rule or principle which requires us to assume that the Act does the same. The only presumption is that the Act complies with the obligations assumed under the Convention: this it does whether it uses 'or' or 'and': in the latter case the United Kingdom has merely gone further than the Convention. This it is entitled to do.<sup>2</sup>

Given that no assistance could be obtained from the Convention, the majority preferred to interpret 'or' as conjunctive, since the other view involved an executive discretion to

<sup>1</sup> [1974] 1 Ll.L.R. at p. 533. The Australian Act referred to provides that 'the owner and the master of the ship are each guilty' of the offence in question.

<sup>2</sup> At p. 531.



determine which of two persons should be exclusively responsible—this, in their opinion, made ‘no sense, in the light of constitutional and legal usage’.<sup>1</sup> This interpretation of the word ‘or’ is not unprecedented,<sup>2</sup> although Lord Reid, dissenting, thought that the consequences of a literal interpretation of the words, though unusual, were neither absurd nor contrary to the intention or policy of the Act or the Convention, so that the ordinary disjunctive meaning was not displaced.<sup>3</sup>

*Municipal law—relation to international convention*

*Case No. 5. The Norwhale*, [1975] 2 W.L.R. 829; [1975] 2 All E.R. 501, Brandon J. Section 1 (1) of the Maritime Conventions Act 1911 provides for liability for damage or loss caused ‘by the fault of two or more vessels’ to be distributed ‘in proportion to the degree in which each vessel was in fault’. Section 8 provides that actions *inter alia* in respect of damage under Section 1 (1) shall not be maintainable ‘unless proceedings therein are commenced within two years from the date when the damage or loss . . . was caused’. In February 1968 the barge *Norwhale* sank in Freemantle harbour as a result of spillage of water from the aircraft carrier H.M.S. *Eagle*. The writ alleging negligence on the part of those on board the *Eagle*, issued by the plaintiffs on 16 August 1973, was thus *prima facie* out of time under Section 8 of the Act. However it was argued that the Act, which stated in the preamble that it was intended to implement the 1910 Brussels Conventions on Unification of Certain Rules of Law with Respect to Collisions between Vessels,<sup>4</sup> and the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea,<sup>5</sup> must be interpreted consistently with those conventions. Since the Collisions Convention required a two-year limitation period only in the case of collisions or of damages caused by the execution or non-execution of a manœuvre,<sup>6</sup> the term ‘fault’ in Sections 1 (1) and 8 must therefore be interpreted as meaning ‘navigational fault’ and as excluding non-navigational faults of management.

In considering this argument, Brandon J. was prepared to have regard *inter alia* to the conventions in question, although he justified this by reference to the fact that they were expressly referred to in the preamble, rather than by any more extensive principle of interpretation of statutes implementing international conventions.<sup>7</sup> He continued:

For the plaintiffs reliance was placed on such decisions as *Salomon v. Customs & Excise Commissioners*, *Post Office v. Estuary Radio*, and *The Banco*. The principle of those cases, as I understand it, is that, where a provision in a statute intended to give effect to an international convention is capable of two meanings, one of which would involve that this country had fulfilled its international obligations and the other that it

<sup>1</sup> At p. 531, *per* Lord Simon.

<sup>2</sup> *R. F. Brown & Co. Ltd. v. Harrison*, (1927) 32 *Reports of Commercial Cases*, p. 305, C.A.; *The Blakeley*, (1916) 234 F. 1959. Cf. *The Banco*, [1971] P. 137, C.A., a case concerning the International Convention relating to the Arrest of Seagoing Ships, 1952, as implemented: there the term ‘or’ in the Convention was clearly intended as disjunctive.

<sup>3</sup> At pp. 522-3. See also the useful note by Collins, *Cambridge Law Journal*, 33 (1974), pp. 181-6.

<sup>4</sup> *United Kingdom Treaty Series*, No. 4 (1913) (Cd. 6677); *British and Foreign State Papers*, vol. 103, p. 434.

<sup>5</sup> *United Kingdom Treaty Series*, No. 4 (1913) (Cd. 6677); *British and Foreign State Papers*, vol. 103, p. 441.

<sup>6</sup> Articles 7, 13.

<sup>7</sup> [1975] 2 W.L.R. at p. 835, relying on *Attorney-General v. Prince Ernest Augustus of Hanover*, [1957] A.C. 436; this *Year Book*, 32 (1955-6), pp. 308-10. Cf. the differing views of Lord Denning M.R. and Roskill L.J. in *Benin v. Whimster*, *supra* Case No. 3.

had not, the former meaning should be preferred to the latter. In the present case, however, accepting that the words of the cross-heading 'Collision, etc.' are capable of more than one meaning, it cannot be said that to give them, and with them the word 'fault' in sections 1 (1) and 8, the wider meaning contended for by the defendant involves any failure of this country to fulfil its international obligations in relation to the Collision Convention. It involves no more than that this country has applied the provisions of the convention to certain cases not covered by the convention as well as to cases which are so covered. This is not in conflict with the convention, which does not expressly or impliedly forbid such wider application. That situation is to be contrasted with, for instance, *The Banco* where the interpretation of section 3 (4) of the Administration of Justice Act 1956 contended for unsuccessfully by the plaintiffs, would, if accepted, have meant that the legislature had given rights of arrest in excess of those permitted by the International Convention relating to the Arrest of Seagoing Ships signed at Brussels on May 10, 1952, which the Act of 1956 was designed to implement.<sup>1</sup>

In any event, the words were both clear and general, and must be interpreted as including damage caused by fault, whether of navigation or administration. The plaintiff's action was accordingly out of time.

As in *The Huntingdon*,<sup>2</sup> the proposition relied on by the learned judge appears to be that, where a statute implementing a convention contains provisions that appear to go further than is required by the Convention itself, there is no presumption that the statute is to be interpreted restrictively by reference to the Convention, provided that the extension is not prohibited by the Convention and is not otherwise inconsistent with it. The validity of this proposition must surely depend on whether the Act on its face has purposes beyond those of strict implementation of the treaty text (as was the case in *The Huntingdon*). Where an Act is passed with the sole apparent purpose of implementing a particular convention, the presumption of consistency with the convention would appear to apply equally to cases of more extensive or more restrictive provisions.

*Municipal law—relation to international convention—International Monetary Fund—Article VIII 2 (b)—'Exchange Contract'—Interpretation*

*Case No. 6. Wilson, Smithett & Cope Ltd. v. Terruzzi*, [1975] 2 W.L.R. 1009, [1975] 2 All E.R. 649, Kerr J. This is the first occasion on which an English court has had to consider at length the effect of Article VIII (2) (b) of the Bretton Woods Fund Agreement<sup>3</sup> as implemented by the Bretton Woods Agreement Order in Council 1946.<sup>4</sup> The point has been much debated in the literature,<sup>5</sup> and although it is one of particular rather than general international law, its importance warrants brief mention here.

Article VIII (2) (b), which was directly incorporated as law by the Schedule to the 1946 Order in Council, provides that

Exchange contracts which involve the currency of any Member and which are contrary to the exchange control regulations of that Member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any Member.

<sup>1</sup> At pp. 836-7.

<sup>2</sup> *Supra* Case No. 4.

<sup>3</sup> *United Nations Treaty Series*, vol. 2, p. 39; *United Kingdom Treaty Series*, No. 21 (1946) (Cmd. 6885).

<sup>4</sup> 1946 No. 36, made pursuant to the Bretton Woods Agreements Act 1945, s. 3 (1).

<sup>5</sup> See especially Mann, *The Legal Aspect of Money*, 3rd ed. (1971), pp. 439-48; Nussbaum, 'Exchange Control and the I.M.F.', *Yale Law Journal*, 59 (1950), pp. 421-30; and works there cited.

Article VIII (2) (b) was pleaded as a defence to an action by a British dealer in metals and metal futures on the London Metal Exchange, by an Italian resident, in respect of a series of contracts for the purchase or sale of copper wirebars, lead and zinc futures. Of the Order in Council of 1946 Kerr J. had this to say:

This is a curiously truncated piece of legislation, being only part of a short sub-article of a lengthy international agreement which is otherwise not directly incorporated into our legislation. It is clear, however, and this was not disputed, that in order to construe this provision the court is not precluded from considering it in the context of the fund agreement as a whole. Indeed, in order to decide whether the exchange control regulations of a member state are 'maintained or imposed consistently with this agreement' the court must necessarily look at the fund agreement as a whole.

Great Britain and Italy are both member states, and it was common ground that Article VIII (2) (b) equally forms part of the law of Italy. The defendant contends that he is under no liability in this action because the plaintiffs' claim is based on contracts which are unenforceable by virtue of this article.<sup>1</sup>

It was admitted that the transactions were contrary to Italian currency control regulations, no permission having been sought or obtained from the Italian authorities. The plaintiffs, however, argued that the contracts were not 'exchange contracts'; that they did not involve the currency of Italy; and that the Italian exchange control regulations were not 'maintained or imposed consistently with' the Fund Agreement. On the second point, Kerr J. concluded that

if 'exchange contracts' is given its ordinary meaning, as discussed below, then in my view the purpose of the words 'which involve the currency of any member' is merely to make it clear that article VIII (2) (b) is concerned to protect the currency of states which are members of the I.M.F. and that it does not apply to other currencies. In such cases, if an 'exchange contract' infringes the exchange control regulations of a member, then I think that it follows that it also involves the currency of that member. But this of course leaves open the question what is meant by 'exchange contracts'.<sup>2</sup>

Nor was he satisfied that the Italian exchange control regulations contravened any provision of the Fund Agreement.

While it is true that the purpose of the I.M.F. is not merely the promotion of international monetary cooperation and exchange stability but also of international trade, these two purposes may, and in many cases inevitably will, conflict to some extent. It is therefore incumbent on each member state to preserve a balance between them and to impose no greater restrictions than are reasonably necessary to achieve this balance. The effect of the Italian decree is no different from the effect of the legislation of many countries which one has encountered in practice. In my judgment, the real test concerning legislation of this kind is not merely its wording but also the manner in which it is administered. The words are 'maintained or imposed', and I think that 'maintained' may well have been intended to include the manner in which the legislation is administered. The Italian decree contains no absolute prohibition but provides in each case for the possibility of obtaining ministerial authorisation. An English court should not assume without evidence, of which there is none in the present case, that the Italian authorities administer their exchange control regulations in a sense contrary to the obligations of Italy as a member of the I.M.F. In the absence of such evidence, and in relation to legislation of a kind which is internationally fairly commonplace in this field, it seems to me that a court of a member state should not assume without evidence that such legislation is not 'maintained or imposed consistently with the I.M.F. agreement'.<sup>3</sup>

<sup>1</sup> [1975] 2 W.L.R. at p. 1015.

<sup>2</sup> At p. 1018.

<sup>3</sup> At p. 1020.



The enforceability of the contracts in question thus depended on whether they were 'exchange contracts' within the meaning of Article VIII (2) (b). Two interpretations were proposed: that of Lord Radcliffe in *In re United Railways of Havana and Regla Warehouses Ltd.*,<sup>1</sup> where a 'true exchange contract' was defined as 'a contract to exchange the currency of one country for the currency of another'; and the more extensive view of Lord Denning M.R. in *Sharif v. Azad*,<sup>2</sup> where such a contract was stated to be one 'which in any way affect(s) the country's exchange resources'. Kerr J. agreed that he must give 'a liberal construction to Article VIII (2) (b) consistent with the fund agreement as a whole':<sup>3</sup> none the less he preferred the more restrictive definition, for a number of reasons. In his view, it was more consistent with the text, and with the meaning of the term 'exchange' in the agreement as a whole. Moreover, such a wide interpretation runs counter to the second paramount purpose of the agreement, to facilitate and promote international trade. The consequence on international trade of this broad interpretation would in fact be the opposite. The great majority of countries have combined a system of exchange or currency control with control on international contracts generally, as regards either their conclusion or their performance or both. It would be extremely difficult, if not impossible, for every contracting party to seek to satisfy itself before entering into an ordinary international contract concerning goods or services or choses in action that all necessary permissions had been obtained. Yet all such contracts can be said to affect the exchange resources of (at least) the payor's country. This difficulty could only in practice be overcome by covering the enforceability of all such contracts by insurance, but this would substantially add to the cost and hamper international trade.<sup>4</sup>

He thus preferred 'the narrow, ordinary but true meaning indicated by Lord Radcliffe—contracts to exchange the currency of our country for the currency of another'.<sup>5</sup> Since the contracts in question were not exchange contracts in this sense, the plaintiffs were entitled to succeed.<sup>6</sup>

*British protected person expelled from Uganda—status—obligation to receive—whether abrogated by Immigration Act 1971—doctrine of incorporation*

Case No. 7. *R. v. Secretary of State for the Home Department, ex parte Thakrar*, [1974] 1 Q.B. 684; [1974] 2 W.L.R. 34, D.C.; [1974] 1 Q.B. 694, [1974] 2 All E.R. 261, C.A. This was a rather unsatisfactory case, not so much for the result, which was inevitable, but for the method by which that result was reached, at least in the Court of Appeal.

<sup>1</sup> [1961] A.C. 1007 at p. 1059; see also Nussbaum, loc. cit. (above, p. 350 n. 5), at p. 426.

<sup>2</sup> [1967] 1 Q.B. 605 at p. 613. This is also Mann's view, op. cit. (above, p. 350 n. 5), at p. 441.

<sup>3</sup> Cf. *per* Diplock L.J., *Sharif v. Azad*, [1967] 1 Q.B. at p. 618.

<sup>4</sup> [1975] 2 W.L.R. at pp. 1024-5.

<sup>5</sup> Ibid.

<sup>6</sup> Two other cases involving the interpretation of treaties decided during the period under review may also be mentioned. In *Pan-American World Airways Inc. v. Department of Trade*, [1975] 2 Ll.L. R. 395, Donaldson J. held an order of the Secretary of State purporting to impose a new condition on plaintiff's operating permit *ultra vires* the Civil Aviation Act 1949, the Chicago Convention on International Civil Aviation, 1974, and in particular the 1946 British-United States Agreement relating to Air Services (*United Kingdom Treaty Series*, No. 3 (1946)): see esp. at p. 400. Cf. however *Seaboard World Airlines Inc. v. Department of Trade*, [1976] 1 Ll.L.R. 42 at p. 47, where the relevance of the 1946 Agreement in the *Pan-American* case was expressly referred to a concession of counsel. In *The Golden Trader*, [1974] 3 W.L.R. 16, Brandon J. held that the Administration of Justice Act 1956, which was intended to implement the Convention for the Arrest of Seagoing Ships, 1952, did so only partially; and that Article 7, which contemplated retention of security pending an arbitration award, had not been implemented in British law: see esp. at p. 27.

Thakrar was born in Uganda in 1939 and was, prior to 1962, a British protected person. He retained that status after Uganda became independent in 1962,<sup>1</sup> although his passport lapsed in 1964. In 1972 he was one of the large number of Ugandan Asians summarily expelled by President Amin.<sup>2</sup> He travelled to Austria on a United Nations travel document, and subsequently sought to enter the United Kingdom, claiming, after some prevarication, that his status as a British protected person entitled him to do so. Permission to enter was refused, and Thakrar applied to the Divisional Court for orders of certiorari and mandamus to quash the decision of the Immigration Officer (and, subsequently, the Home Secretary) and to direct that he be allowed to enter. The Divisional Court dismissed his application, and the Court of Appeal, unanimously, dismissed his appeal.<sup>3</sup> It will clarify analysis of the case if the various arguments made on Thakrar's behalf are discussed separately.

(1) *Thakrar's status as a British protected person.* Article 3 (8) of the Immigration Act 1971 provides that the burden of proving any status or entitlement under the Act lies on the person claiming the status or entitlement. Here, there was at least some evidence that Thakrar had, at some time after 1964, acquired Ugandan nationality and accordingly lost his British protected status.<sup>4</sup> In the Divisional Court Lord Widgery C.J. (with whom Bridge and May JJ. concurred) based his judgment primarily on a finding that Thakrar had not been treated unfairly by the Immigration Officer or the Home Office and that sufficient evidence had been considered by them to justify their refusal to admit Thakrar.<sup>5</sup> On this point the Court of Appeal was in full agreement.<sup>6</sup> Since Thakrar was not able to establish his status as a protected person he failed *in limine*, and the observations made in particular by Lord Denning M.R. and Lawton L.J. in the Court of Appeal on the international law arguments were in the strictest sense *obiter*. However, since both counsel, and their Lordships, proceeded on the hypothesis that Thakrar had been able to establish his protected status, those arguments must also be considered.

(2) *The international and municipal status of protected persons.* In the Divisional Court, the Crown conceded, for the purposes of this case only, that a British protected person should be treated in the same way as a United Kingdom citizen.<sup>7</sup> The matter was not therefore considered by the Divisional Court;<sup>8</sup> and no extensive argument was addressed to this issue before the Court of Appeal.<sup>9</sup> None the less, the matter was considered by two of their Lordships. Lord Denning asserted that

In strict international law, the sovereignty over Uganda was not in the Queen of England, but in the local rulers, the Kabaka of Buganda and the Kings of Toro, Ankoli and Bunyoro. The defence and external affairs were under the control . . . of the United Kingdom and much of the internal administration also . . . The people born there and living there were not British subjects, but they were British protected persons. As such they were under the protection of the British Crown, but they had not the same rights as British subjects.<sup>10</sup>

<sup>1</sup> Pursuant to the Uganda Independence Act 1962, s. 2 (2).

<sup>2</sup> See Wooldridge and Sharma, 'International Law and the Expulsion of Ugandan Asians', *International Lawyer*, 9 (1975), pp. 30-76; Plender, 'The Exodus of Asians from East and Central Africa: Some Comparative and International Law Aspects', *American Journal of Comparative Law*, 19 (1971), pp. 287-324.

<sup>3</sup> The Appeal Committee dismissed a petition for leave to appeal to the House of Lords: [1974] 1 Q.B. 711.

<sup>4</sup> The evidence is set out in Lord Denning's judgment: [1974] 1 Q.B. at pp. 705-6.

<sup>5</sup> At pp. 692-3.

<sup>6</sup> At pp. 706-7 *per* Lord Denning; at p. 709 *per* Lawton L.J.

<sup>7</sup> At p. 687.

<sup>8</sup> At p. 690.

<sup>9</sup> But *cf.* pp. 696-7.

<sup>10</sup> At p. 702



Lawton L.J., to much the same effect, distinguished the international status of protected persons from that of British subjects by reference to the 'medieval concept of allegiance': since protected persons did not owe allegiance to the Crown, they could not benefit from the asserted rule of international law requiring a State to receive expelled nationals.<sup>1</sup>

It is, with respect, difficult to accept these spontaneous pronouncements as to protected status. In the first place, there is an evident confusion between the international and British municipal legal characterization of protectorates such as Uganda was before 1962, where the Crown exercised substantial powers of internal control. For virtually all purposes of international law, such protectorates were treated as indistinguishable parts of the protecting State; or, in Judge Huber's terms, 'colonial protectorates'.<sup>2</sup> It followed that citizens of protected territories were for international purposes in much the same position as nationals of the administering state.<sup>3</sup> The notion that 'in strict international law, the sovereignty over Uganda was . . . in the local rulers' is thus clearly erroneous. British statute law was also, to some extent, attentive to this distinction between colonial and international protectorates;<sup>4</sup> but the courts, at least prior to *Ex parte Mwenya*,<sup>5</sup> refused to inquire into the formal categorization of protected territory as 'foreign', even though it was clear that international law looked to the substance rather than the label.<sup>6</sup> In *Ex parte Mwenya*, the Court of Appeal held that *habeas corpus* would go to test the legality of a detention of a protected person in a British protectorate. As Lord Evershed M.R. pointed out,

if upon a proper investigation of the facts, it appears that the internal governance of Northern Rhodesia is in effect indistinguishable from that of a British colony . . . then I see . . . no reason for denying jurisdiction to the Court.<sup>7</sup>

It remained an open question, after 1960, whether the courts would extend this reasoning to hold act of State inapplicable as a defence against protected person;<sup>8</sup> and generally to assimilate protected persons with nationals of colonial territories. Although the *dicta* in the present case might indicate a reversion to the older, formalistic view of protected status, *Ex parte Mwenya* was not relied upon by counsel for Thakrar,<sup>9</sup> and the question must be regarded as still open.

(3) *The duty to receive expelled nationals at international law.* On the footing that Thakrar was in the position of a United Kingdom citizen, it was argued that international law required the United Kingdom to receive him. In the Divisional Court Lord Widgery thought it sufficient

<sup>1</sup> At pp. 709-10.

<sup>2</sup> *Island of Palmas* arbitration, *Reports of International Arbitral Awards*, vol. 2, p. 858.

<sup>3</sup> *National Bank of Egypt v. Austria-Hungary Bank*, *Recueil des décisions des tribunaux arbitraux mixtes*, vol. 3 (1924), p. 236 at 238. On nationality in protectorates see also J. M. Jones, *British Nationality Law and Practice* (1947), pp. 288-99; Van Panhuys, *The Role of Nationality in International Law* (1959), pp. 64-8; Kamanda, *A Study of the Legal Status of Protectorates in Public International Law* (Geneva, 1961), pp. 246-58.

<sup>4</sup> Cf. the distinction between protectorates and protected states under the British Nationality Act, 1948: Parry, *Nationality and Citizenship Laws of the Commonwealth* (1957), pp. 356-63.

<sup>5</sup> [1960] 1 Q.B. 241; this *Year Book*, 36 (1960), pp. 404-6.

<sup>6</sup> *Ol le Njogo v. Attorney-General*, (1913) 5 E.A.L.R. 70, cited by Lawton L.J. at p. 710, was an example of this formalistic approach.

<sup>7</sup> [1960] 1 Q.B. at 302.

<sup>8</sup> Cf. Polack, 'The Defence of Act of State in Relation to Protectorates', *Modern Law Review*, 26 (1963), pp. 138-55; Kato, 'Act of State in a Protectorate—in Retrospect', *Public Law*, 1969, pp. 219-35.

<sup>9</sup> It was cited once, without comment, by Lord Denning at p. 702.



to say that there clearly is authority that in international law an obligation on a country exists to receive back its nationals if those nationals are expelled from other countries in the world.<sup>1</sup>

Before the Court of Appeal, the additional point was taken by the Crown that any rule of international law requiring the United Kingdom to receive expelled nationals was an interstate obligation, and not one which enures to the benefit of individuals.<sup>2</sup> However, at no stage did the Crown dispute the proposition that a State has a duty to receive expelled nationals. Once again, therefore, the observations made on the point were strictly *obiter*. In Lord Denning's view, the international law rule requiring reception of expelled nationals was not 'universally accepted or known for certain', since international law had never had to cope with the problem of mass expulsion.<sup>3</sup> Moreover, a distinction was drawn—on what basis or with what authority is not clear—between a 'self-contained country with no overseas territories or protectorates', and 'an outgoing country with far-flung commitments, such as the United Kingdom has or until recently did have'.<sup>4</sup>

Mass expulsions have never hitherto come within the cognizance of international law. To my mind, there is no rule of international law to which we may have recourse. There is no rule by which we are bound to receive him.<sup>5</sup>

Even if such a rule existed, it applied only as between States; and it did not apply where another State (in this case India and Austria) was willing to receive him.<sup>6</sup> Lawton L.J. on the other hand appeared to concede the existence of a rule, but thought it 'so vague and imprecise that it is difficult to know to whom it does apply'—at least in the absence of a 'Moses to bring the Law of Nations down from Mount Sinai'.<sup>7</sup> Orr L.J., on the other hand, merely observed that

the obligation is owed, not to the individual expelled, but towards all other states and is restricted to the receiving of a national who has nowhere else to go . . . On the whole of the argument I have not been satisfied that the obligation under international law goes beyond these limits and I am inclined . . . to accept [the] contention that the rule came into being as a necessary corollary of the recognition by international law of a state's right not to accept aliens into its territory if it does not wish to do so.<sup>8</sup>

The validity of the various assertions as to the international law position with respect to expelled nationals need not be discussed here:<sup>9</sup> it is sufficient to say that there is overwhelming authority as to the duty of a State to accept expelled nationals,<sup>10</sup> although such reception need not be to its metropolitan territory if other appropriate places of

<sup>1</sup> At p. 690.

<sup>2</sup> At p. 694.

<sup>3</sup> At p. 701. *Sed quaere*. Cf. A. M. de Zayas, 'International Law and Mass Population Transfers', *Harvard International Law Journal*, 16 (1975), pp. 207-58 at p. 242.

<sup>4</sup> At p. 702.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> At pp. 709, 710.

<sup>8</sup> At pp. 708-9, citing Oppenheim, *International Law*, vol. 1 (8th ed., 1955), p. 645.

<sup>9</sup> For criticism and comment see Akehurst, 'Uganda Asians and the Thakrar Case', *Modern Law Review*, 38 (1975), pp. 72-7; White, 'When is a British Protected Person not a British Protected Person?', *International and Comparative Law Quarterly*, 23 (1974), pp. 866-73; and cf. Marston, *Cambridge Law Journal*, 33 (1974), pp. 186-90.

<sup>10</sup> Weis, *Nationality and Statelessness in International Law* (London, 1956), pp. 49-60; Plender, *International Migration Law* (Leyden, 1972), pp. 71-93; Van Panhuys, *op. cit.* (above, p. 354 n. 3), p. 55. On an Article 177 reference from England, the European Court of Justice also recently and unequivocally affirmed that . . . 'it is a principle of international law . . . that a State is precluded from refusing its own nationals the right of entry or residence': *Van Duyn v. Home Office*, [1975] 1 C.M.L.R. 1 at p. 18.

settlement are available; but that this duty is one owed between States, and not (apart from treaty) to the persons concerned.<sup>1</sup>

(4) *The duty to receive and the doctrine of incorporation.* It was further argued for Thakrar that the international law rule requiring reception of expelled nationals was itself received by British law under the doctrine of incorporation. Lord Widgery appears to have accepted this view;<sup>2</sup> however, if the rule only applies between States, the relevance of incorporation would appear to be limited. Lord Denning's view of the doctrine was more restrictive:

In my opinion, the rules of international law only become part of our law in so far as they are accepted and adopted by us.<sup>3</sup>

Lawton L.J., to similar effect, stated that

when anyone in the United Kingdom seeks to enforce against the Crown what he alleges is a right arising under public international law, the courts have to decide what is the nature and extent of the right and whether there are any limitations imposed upon it by statute.<sup>4</sup>

Orr L.J., while referring to the 'conflicting theories' of incorporation, did not express an opinion on the point, relying instead on the established rule that

a rule of international law cannot be treated as incorporated into English municipal law where to do so would be inconsistent with the provisions of a statute.<sup>5</sup>

Although the conflict between the two views—which may be described as the 'automatic' and the 'selective' views—of incorporation has been the subject of some debate, it is not clear how much difference in practice there is between them. British courts have on the whole tended to the more restrictive view, but, as this case demonstrates, their attitude to the problem has depended on the context, and on their view of the rule in question.

(5) *The effect of the Immigration Act 1971.* The problem of proof apart, this short point was the only one directly relevant to the decision in the case. Counsel for Thakrar argued that, on the assumption that the international law rule was incorporated into English law, the Immigration Act must be presumed not to have interfered with Thakrar's right of reception. The short answer to this was that the Immigration Act was on its face intended as a comprehensive code regulating admission to the United Kingdom, so that any pre-existing rights must by implication have been displaced.<sup>6</sup> In particular, the terms of Section 3 (1) of the Act ('Except as otherwise provided by or under this Act . . .') demonstrated a clear intention to lay down a comprehensive code regulating immigration. Compliance by the United Kingdom with any obligation to admit nationals was thereafter a matter for the executive, not the courts, to regulate, by giving of leave under Section 3.<sup>7</sup>

*Municipal law—relation to treaty—relevance of international human rights provisions—interpretation*

*Case No. 8. R. v. Miah*, [1974] 1 All E.R. 1110; [1974] 1 W.L.R. 683, C.A.; *sub.*

<sup>1</sup> *Contra* Plender, *op. cit.* (previous note), p. 74.

<sup>2</sup> At p. 690: 'that rule of international law should be treated as a rule of English national law, and unless abrogated by some statute, should still apply at the present time.'

<sup>3</sup> At p. 701, citing *Chung Chi Cheung v. R.*, [1939] A.C. 160 at pp. 167-8.

<sup>4</sup> At p. 709.

<sup>5</sup> At p. 708.  
<sup>6</sup> At pp. 690-2 *per* Lord Widgery C.J.; p. 703 *per* Lord Denning M.R.; p. 708 *per* Orr L.J.; p. 710 *per* Lawton L.J.

<sup>7</sup> At p. 696.

*nom. Waddington v. Miah*, [1974] 2 All E.R. 377; [1974] 1 W.L.R. 692; 59 Cr. App. R. 149 (1974), H.L. Moyna Miah entered the United Kingdom on a forged passport in October 1971. He was apprehended at Scunthorpe on 29 September 1972, while still in possession of the passport. His entry and possession of the passport were offences under Sections 4 (3) and 4A of the Commonwealth Immigrants Acts 1962 and 1968, but by 28 June 1973, when eventually informations were laid against him, the six-month limitation period in respect of both offences had expired. Accordingly, he was charged with having entered the United Kingdom without leave contrary to Section 24 (1) (a) of the Immigration Act 1971,<sup>1</sup> and with having in his possession for the purpose of the Act a passport which he had reasonable cause to believe to be false, contrary to Section 26 (1) (d).<sup>2</sup> Miah was tried and convicted on both counts before the Crown Court at Grimsby, and appealed to the Court of Appeal. That Court upheld the appeal but certified that a point of law of general public importance was involved, and thus granted the Crown leave to appeal to the House of Lords.

The point of law involved was an apparently simple one: whether the penal provisions of the Immigration Act 1971, which came into effect on 1 January 1973, were retrospective in effect.<sup>3</sup> Section 34 (1) of the Act, which had been relied upon by the Crown in the lower courts, reads in part as follows:

- (a) this Act, as from its coming into force, shall apply in relation to entrants or others arriving in the United Kingdom at whatever date before or after it comes into force; and
- (b) after this Act comes into force anything done under or for the purposes of the former immigration laws shall have effect, in so far as any corresponding action could be taken under or for the purposes of this Act, as if done by way of action so taken, and in relation to anything so done this Act shall apply accordingly.

In the Court of Appeal Stephenson L.J. explained Section 34 (1) (a) as 'applying to the persons of immigrants and not to things done by them':<sup>4</sup> in other words, immigrants, irrespective of the date at which they entered the United Kingdom, became subject to the Act from its coming into force. Section 34 (1) (b) was intended to deal 'with acts of the executive, such as acts of immigration officers in granting leave or directing removal' and had 'nothing to do with what is done by the immigrants themselves'.<sup>5</sup>

Lord Reid, who delivered the only judgment in the House of Lords, thought the matter even clearer.<sup>6</sup> What is of interest for present purposes is that Lord Reid, as well as referring to the presumption against retrospective penal legislation in English law,<sup>7</sup> relied on Article 11 (2) of the Universal Declaration of Human Rights,<sup>8</sup>

<sup>1</sup> 1971 c. 77.

<sup>2</sup> Under section 28 of the Act, the limitation period for certain offences, including those with which Miah was charged, could be as long as three years, provided that an information was laid within two months after the date on which sufficient evidence to justify prosecution came to the notice of the police.

<sup>3</sup> In another respect (liability to deportation of persons who entered illegally prior to the coming into force of the Act) the 1971 Act had already been held to be retrospective in effect: *Azam v. Secretary of State*, [1974] A.C. 18, esp. *per* Lord Wilberforce at p. 59.

<sup>4</sup> [1974] 1 All E.R. 1110 at 1117.

<sup>5</sup> *Ibid.* For the argument from s. 35 (3) see pp. 1115-16; and in the House of Lords [1974] 2 All E.R. 377 at 380.

<sup>6</sup> *Ibid.*

<sup>7</sup> As to which see Halsbury, *Laws of England* (3rd ed.), vol. 36, pp. 425-6; Maxwell, *Interpretation of Statutes* (12th ed., 1969), pp. 215-27; and *per* Stephenson L.J. [1974] 1 All E.R. at p. 1116.

<sup>8</sup> U.N. Doc. A/811; (1949) Cmd. 7662.



and Article 7 (1) of the European Convention on Human Rights and Fundamental Freedoms.<sup>1</sup> The two Articles are in substance the same:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

The existence of these provisions, in Lord Reid's view, made it 'hardly credible that any government department would promote or that Parliament would pass retrospective criminal legislation'.<sup>2</sup> Stephenson L.J. had also referred to the fact that the two articles had 'forbidden' retrospective penal legislation.<sup>3</sup>

British courts have frequently to deal with cases involving the interpretation of municipal law with reference to an international convention. However, reference to human rights conventions is comparatively rare: this was the first reported case<sup>4</sup> in which the provisions of the European Convention were relied on in the interpretation of United Kingdom legislation. The strong application, by both courts, of the relevant provisions is therefore welcome, even if the point in issue was not a difficult one.<sup>5</sup>

*Municipal law—relation to treaty—relevance of international human rights provisions*

*Case No. 9. R. v. Secretary of State for the Home Department, ex parte Bhajan Singh*, [1975] 3 W.L.R. 225, D.C. & C.A. Bhajan Singh was arrested in April 1975 as an illegal immigrant. While arrangements were being made for his deportation, he sought leave to marry. Leave having been refused, he applied for mandamus to require the Home Secretary properly to consider his application. He relied exclusively on Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Both the Divisional Court and the Court of Appeal regarded Article 12 as relevant to the application. Lord Widgery stated that 'there is no doubt that the terms of the Convention . . . are properly to be regarded in this country where an issue in this country makes them relevant'.<sup>6</sup> However, several factors weighed against the applicant, in his Lordship's opinion.

First of all, it is to be observed that the right under article 12 is to marry and to found a family. Quite evidently there is no element of founding a family in the application put forward . . . on behalf of this applicant. I, for my part, am not disposed to say that the right to marry simpliciter, unless associated with the founding of a family, is necessarily within the terms of article 12.

Furthermore, so far as the rights of persons in custody are concerned, it is relevant, I think, to look at article 5. The fundamental right conveyed by article 5 is that everybody has the right to liberty and security of person, but there are exceptions specifically made.

<sup>1</sup> *United Kingdom Treaty Series*, No. 71 (1953) (Cmd. 8969).

<sup>2</sup> [1974] 2 All E.R. at p. 379.

<sup>4</sup> But not the last: cf. cases 9, 10 *infra*.

<sup>5</sup> The respondent was awarded his costs in the House of Lords. He was later, apparently, deported under s. 5 of the Act. See also the note by Wallington, *Cambridge Law Journal*, 34 (1975), pp. 9-11.

<sup>6</sup> [1975] 3 W.L.R. at p. 228.

<sup>3</sup> [1974] 1 All E.R. at p. 1116.

One of them in paragraph (1) (f) is 'the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. That makes it quite clear that the fundamental rights are subject to special considerations such as the necessity for incarcerating people who have crossed national boundaries unlawfully, and I think that lends support to the view that the Home Secretary was perfectly entitled to take the view which he took in this case.<sup>1</sup>

His Lordship concluded that

giving article 12 its full weight it does not produce a situation in which a prisoner can, as of right, require the Secretary of State to provide him with facilities to get married. Nor do I think that the Secretary of State's decision in this case was vitiated on any of the grounds put forward in argument . . .<sup>2</sup>

The decision was affirmed on appeal. Lord Denning's judgment read in part as follows:

What is the position of the Convention in our English law? I would not depart in the least from what I said in the recent case of *Birdi v. Secretary of State for Home Affairs*, February 11, 1975, Bar Library Transcript No. 67B. The court can and should take the Convention into account. They should take it into account whenever interpreting a statute which affects the rights and liberties of the individual. It is to be assumed that the Crown, in taking its part in legislation, would do nothing which was in conflict with treaties. So the court should now construe the Immigration Act 1971 so as to be in conformity with a Convention and not against it.

In addition, I would add that the immigration officers and the Secretary of State in exercising their duties ought to bear in mind the principles stated in the Convention. They ought, consciously or sub-consciously, to have regard to the principles in it—because, after all, the principles stated in the Convention are only a statement of the principles of fair dealing: and it is their duty to act fairly.

I would, however, like to correct one sentence in my judgment in *Birdi's* case. I said that if an Act of Parliament did not conform to the Convention, I might be inclined to hold that it was invalid (p. 9 of transcript). That was a very tentative statement, but it went too far. There are many cases in which it has been said, as plainly as can be, that a treaty does not become part of our English law except and in so far as it is made so by Parliament. If an Act of Parliament contained any provisions contrary to the Convention, the Act of Parliament must prevail. But I hope that no Act ever will be contrary to the Convention. So the point should not arise.

I would repeat that when anyone is considering a problem concerning human rights, we should seek to solve it in the light of the Convention and in conformity with it . . . So I will say it is hardly credible that any government department or Parliament would do anything contrary to article 12.<sup>3</sup>

His Lordship regarded Article 12 as giving only a qualified or limited right to marry 'as far as circumstances permit': in particular Article 5 (1) (f) was regarded as a special provision derogating from the general right provided for in Article 12. The Home Secretary's decision to remove the applicant without first giving him the opportunity to marry was thus a proper exercise of his discretion under the Immigration Act.<sup>4</sup> However his Lordship took the opportunity of correcting the rather dubious interpretation given to Article 12 in the Divisional Court: in his view, 'a couple might have a right to marry even though there was no immediate prospect of founding a family'.<sup>5</sup>

<sup>1</sup> At pp. 228-9.

<sup>2</sup> Ibid. James L.J. and May J. agreed.

<sup>3</sup> At pp. 230-1, citing *R. v. Miah*, *supra* Case No. 8.

<sup>4</sup> At pp. 230-2. Browne and Geoffrey Lane L.JJ. agreed.

<sup>5</sup> At p. 232.

Proof of entitlement to the rights protected by Article 12 might otherwise be a difficult matter.

*Municipal law—relation to treaty—relevance of international human rights provisions—immigration practice*

*Case No. 10. R. v. Secretary of State for the Home Department, ex parte Phansopkar; R. v. Secretary of State for the Home Department, ex parte Begum*, [1975] 3 W.L.R. 322, [1975] 3 All E.R. 497, D.C. and C.A. The applicants in these two cases were the wives of patrials: they accordingly had the right under Section 2 (2) of the Immigration Act 1971 to be admitted into the United Kingdom. They arrived at London Airport without the necessary certificate of patriality under Section 3 (9) and were refused admission, on the grounds that their applications could most satisfactorily be dealt with by the relevant British authorities in Bombay and Dacca respectively. On applications for certiorari and mandamus, the Divisional Court held that the immigration authorities had not contravened their duty of fairness to applicants for admission, and referred particularly to the problem of queue-jumping.<sup>1</sup> The decisions of the Divisional Court were, however, overturned on appeal.

Before the Court of Appeal, the applicants cited Article 8 of the European Convention, which provides that

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Their Lordships all relied on Magna Carta, chapter 29, as the foundation for the proposition that administrative machinery might not be used to deprive claimants of their legal rights:<sup>2</sup> only Scarman L.J. referred to the argument from Article 8:

Whatever may be thought of the plight of those who seek only leave to enter the United Kingdom, it is a matter for serious concern that those who claim the right or freedom 'to live in, and to come and go into and from the United Kingdom without let or hindrance' . . . have to wait 14 months or more for an adjudication upon their claim. However, when the claim (as in these two cases) is that the right arises from the status of wife to a man living in this country, the delay may impose great hardship and stress upon private and family life. Delay of this order appears to me to infringe at least two human rights recognized, and therefore protected, by English law. Justice delayed is justice denied: 'We will not deny or defer to any man either justice or right': Magna Carta, chapter 29. This hallowed principle of our law is now reinforced by the European Convention on Human Rights to which it is now the duty of our public authorities in administering the law, including the Immigration Act 1971, and of our courts in interpreting and applying the law, including the Act, to have regard . . . It may of course, happen under our law that the basic rights to justice undeferred and to respect for family and private life have to yield to the express requirements of a statute. But in my judgment it is the duty of the courts, so long as they do not defy or disregard clear unequivocal provision, to construe statutes in a manner which promotes, not endangers those rights. Problems of ambiguity or omission, if they arise under the language of an

<sup>1</sup> At p. 327 *per* Lord Widgery C.J.

<sup>2</sup> At p. 334 *per* Lord Denning M.R.; p. 337 *per* Lawton L.J.



Act, should be resolved so as to give effect to, or at the very least so as not to derogate from the rights recognized by Magna Carta and the European Convention . . . If the Secretary of State wishes to compel these applicants to stand in that long queue waiting in India and Bangladesh he should say so in an appropriate immigration rule so that all who claim the right may know. Had I entertained any doubt I would have held without hesitation that the combination of Magna Carta and the European Convention would not permit in law the Secretary of State to maintain either of the two positions I have mentioned. Neither the statute nor the rules help him, and without clear and express provision in the statute or rule, there is no overriding that combination.<sup>1</sup>

Orders of mandamus therefore issued to require the Secretary of State to consider the applicants' claims on their merits.

In five cases, therefore,<sup>2</sup> British courts have referred to the Universal Declaration, or the European Convention, in order to interpret or apply British municipal law; and this despite the lack of municipal implementation of either instrument. In *Miah's* case, as has been seen, the point in issue was not a difficult one;<sup>3</sup> on the other hand, in both *Bhajan Singh* and the instant cases the court was prepared to delimit an otherwise extensive administrative discretion by reference to provisions of the Convention. It is probably fair to attribute this relatively sudden *jurisprudence* to the influence of the European Convention rather than the Universal Declaration: it is of interest that no reference was made in *Thakrar's* case to Article 13 (2) of the Universal Declaration, which has no parallel in the European Convention.<sup>4</sup> Those advising immigrants, and others whose human rights as enumerated in the Convention are affected by administrative action, will no doubt be alert to the possibility of pleading the Convention before British courts; indeed, in the cases reviewed here, it could hardly have made a difference had the Convention been implemented in terms as part of the local law. Whether this *jurisprudence* will become *constante*, however, remains to be seen.

*Jurisdiction—criminal law—possession of firearms in England with intent to endanger life abroad*

Case No. 11. *R. v. El-Hakkaoui*, [1975] 2 All E.R. 146, C.A. El-Hakkaoui was arrested at Heathrow Airport, and charged *inter alia* with conspiracy to contravene Section 16 of the Firearms Act 1968, which makes it an offence

for any person to have in his possession any firearm or ammunition with intent by means thereof to endanger life . . . whether any injury has been caused or not.

El-Hakkaoui had intended to use the firearms in question to kidnap French government officers in Paris, with a view to procuring the release by the government of Morocco of a number of political prisoners. On appeal from his conviction, the single point was taken that Section 16 was intended to protect the lives only of people within the United Kingdom, so that possession of firearms within the United Kingdom with intent to endanger life elsewhere was not covered by the Act. Counsel for the appellant referred to the public policy of the criminal law and to the 'comity of nations', and relied upon the dissenting judgments of Lord Reid and Lord Morris in *Treacy v. Director of*

<sup>1</sup> At pp. 339, 341, citing *Singh's* case, *supra* Case No. 9.

<sup>2</sup> Including the unreported case of *Birdi v. Home Secretary*, referred to at p. 359 above.

<sup>3</sup> *Supra* Case No. 8.

<sup>4</sup> *Supra* Case No. 7. Cf. also the reference to the *Golder* case in *Ex parte Bhajan Singh*, [1975]

3 W.L.R. at p. 228.

*Public Prosecutions*.<sup>1</sup> Browne L.J., who delivered the judgment of the Court of Appeal, in response to this argument, declined to

base our decision on the comity of nations or on public policy, but it seems to us that these considerations would lead to exactly the opposite conclusion from that submitted by counsel for the applicant. To take one example: suppose a man is found in an hotel bedroom in Dover with a revolver and ammunition for which he has somehow managed to get a firearms certificate. When asked to explain himself, he says he is going to France the next day in order to assassinate the President. If counsel for the appellant is right, there is nothing the police could do about it. That seems to us a strange idea of the comity of nations.<sup>2</sup>

The answer to the appellant's argument from comity could as easily have been given in the words of Lord Diplock in *Treacy's case*:

There is no rule of comity to prevent Parliament from prohibiting under pain of punishment persons who are present in the United Kingdom, and so owe local obedience to our law, from doing physical acts in England, notwithstanding that the consequences of those acts take effect outside the United Kingdom. Indeed, where the prohibited acts are of a kind calculated to cause harm to private individuals it would savour of chauvinism rather than comity to treat them as excusable merely on the ground that the victim was not in the United Kingdom itself but in some other State.<sup>3</sup>

In any event, the elements of this offence were possession and intent, both of which existed within the jurisdiction, and neither of which, of themselves, had effects outside the jurisdiction. The comity point did not, therefore, really arise.<sup>4</sup>

*Sovereign immunity—action in personam—acts jure gestionis performed outside the jurisdiction—immunity granted*

Case No. 12. *Thai-Europe Tapioca Service v. Government of Pakistan, Ministry of Food and Agriculture Directorate of Agricultural Supplies (Import and Shipping Wing)*. *The Harmattan*, [1975] 1 W.L.R. 1485, C.A. In September 1971 the plaintiffs, a German company, let the ship *Harmattan* to a Polish company to carry fertilizer to Karachi on account of the West Pakistan Agricultural Development Corporation. The bill of lading incorporated the terms of the charterparty, under which English law was the proper law. While waiting for a berth at Karachi, the *Harmattan* was extensively damaged by an Indian air-raid. The plaintiffs sued for demurrage, but before the writ was served the Government of Pakistan dissolved the Development Corporation, which was succeeded by a branch of the Ministry of Food and Agriculture, an instrumentality of the central government without separate legal personality. The Government of Pakistan then applied to set aside the writ on the ground of

<sup>1</sup> [1971] A.C. 537; this *Year Book*, 45 (1971), pp. 393-5.

<sup>2</sup> [1975] 2 All E.R. at p. 149.

<sup>3</sup> [1971] A.C. at pp. 561-2.

<sup>4</sup> The Appeal Committee refused leave to appeal to the House of Lords: [1975] 2 All E.R. at p. 154. For a case raising similar issues, cf. *R. v. Horne*, [1975] R.T.R. 256, C.A. See also *Secretary of State for Trade v. Markus*, [1975] 1 All E.R. 958, H.L.; affirming the decision of the Court of Appeal, *sub. nom. R. v. Markus*, [1974] 3 All E.R. 705. There the House held 4-1 (Viscount Dilhorne dissenting) that a London company director connived at inducing persons in Germany to take part in an arrangement involving speculative property investments, contrary to s. 13 (1) of the Prevention of Fraud (Investments) Act, 1958 as amended, since the offence so created was a 'result crime', and part of the prescribed result (*viz.* the formal conclusion of the arrangement) took place in England; citing *R. v. Ellis*, [1899] 1 Q.B. 230. No reference was made to any issue of comity.

sovereign immunity. The Court of Appeal affirmed the order of Cusack J. setting aside the writ.

Although their Lordships in the Court of Appeal were unanimous in the result, their reasons were distinctly different. Lawton L.J. (with whom Scarman L.J. in substance agreed) emphasized that, in an *in personam* action against a government instrumentality, the nature of the transaction or the property in question could not be relevant. In the words of Bankes L.J. in *Compañía Mercantil Argentina v. United States Shipping Board*:

The question as to whether the vessel was or was not employed in private trading really does not arise in a case . . . where proceedings are taken *in personam*, and it is established to the satisfaction of the Court that the body against whom the proceedings are taken is a body representing a Sovereign State.<sup>1</sup>

The *United States Shipping Board* case was, in the majority view, squarely in point and bound the Court of Appeal to decide the case in the defendant's favour.<sup>2</sup> Both their Lordships agreed that no account could be taken, at least in the Court of Appeal, of 'the developing consensus of juristic and judicial opinion all over the world in favour of what may briefly be called the commercial exception to the absolute character of the doctrine of sovereign immunity'.<sup>3</sup> In the words of Scarman L.J.:

I do not think myself it is open to this court to go further than the journey already taken in the House of Lords and the Court of Appeal in the cases to which we have been referred. I think it is important to realize that a rule of international law, once incorporated into our law by decisions of a competent court, is not an inference of fact but a rule of law. It therefore becomes part of our municipal law and the doctrine of stare decisis applies as much to that as to a rule of law with a strictly municipal provenance. This has been stated again and again in the cases . . . and it is to be found I think by necessary implication in the speech of Lord Macmillan in *The Cristina* . . . I think therefore that it is not open to this court to apply a new rule or view developing in the international field if it be inconsistent with a rule already incorporated into our law by a decision of the Court of Appeal or the House of Lords.<sup>4</sup>

Neither judge referred to the decision of the Hong Kong Supreme Court in *The Philippine Admiral*,<sup>5</sup> although both referred to the possibility of reconsidering *The Porto Alexandre*<sup>6</sup> on some future occasion, where 'a plea of immunity from suit of property belonging to, or claimed by, a foreign sovereign within the territory of our jurisdiction'<sup>7</sup> is in issue, and the property has been used in a strictly commercial non-governmental transaction.

On the other hand, Lord Denning M.R., not for the first time,<sup>8</sup> took the opportunity to survey the law of sovereign immunity, and in particular the exceptions to the general principle of immunity. After stating two such 'recognized' exceptions (realty situate in England, and trust funds or money lodged for payment of creditors in England), his

<sup>1</sup> 40 T.L.R. 601 (1924) at 602; this *Year Book*, 5 (1924), at p. 226.

<sup>2</sup> [1975] 1 W.L.R. 1485 at p. 1493 *per* Lawton L.J.

<sup>3</sup> At p. 1495 *per* Scarman L.J.; p. 1493 *per* Lawton L.J.

<sup>4</sup> At p. 1495, citing [1938] A.C. 485 at p. 497; cf. *per* Lawton L.J. at p. 1493.

<sup>5</sup> *Infra* Case No. 13.

<sup>6</sup> [1920] P. 30; this *Year Book*, 1 (1920-1), at p. 280.

<sup>7</sup> At p. 1494 *per* Scarman L.J. Presumably the reference is to an action *in rem*.

<sup>8</sup> Cf. his speech in *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379 at pp. 415-24; this *Year Book*, 34 (1958), at pp. 397-400. The other law lords dissociated themselves from Lord Denning's remarks in that case.



Lordship went on to discuss two further exceptions which are, in his view, 'coming to be recognized'.

Third, a foreign sovereign has no immunity in respect of debts incurred here for services rendered to its property here. If it owns a trading vessel which goes aground on our shores, the tugs which pull it off are entitled to be paid: and, if not paid, the vessel can be arrested. *The Porto Alexandre* . . . (which decided otherwise) would be decided differently today, having regard to the Brussels Convention of 1926 and to the criticism to which that case has been subjected in the House of Lords<sup>1</sup> . . . and elsewhere. Likewise if a foreign government owns a motor vehicle here and sends it to a garage here to be repaired, the repairer is entitled to be paid: and if not paid, he can claim a lien on the car. This exception is further supported by the decision of the Hong Kong Court of Appeal in *The Philippine Admiral* . . . It is now under appeal to the Privy Council . . .

Fourth, a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts. If a foreign government incorporates a legal entity which buys commodities on the London market: or if it has a state department which charters ships on the Baltic Exchange: it thereby enters into the market places of the world: and international comity requires that it should abide by the rules of the market. Usually the contract contains an arbitration clause, in which case, of course, there is a voluntary submission to the jurisdiction of the arbitrators and the supervision of them by the courts: see, for instance, *President of India v. Metcalfe Shipping Co. Ltd.*<sup>2</sup> . . . But even if there is no arbitration clause . . . a foreign government which enters into an ordinary commercial transaction with a trader here must honour its obligations like other traders: and if it fails to do so, it would be subject to the same laws and amenable to the same tribunals as they: see, for instance, *Union of India v. E. B. Aaby's Rederi A/S*<sup>3</sup> . . . where the Indian Government declined to pay general average contribution in breach of the undertaking given by the High Commissioner in London. This fourth exception has been recognized in the courts of the United States in respect of transactions which are properly within the territorial jurisdiction of those courts.<sup>4</sup> . . .

I may perhaps say that I had occasion to study sovereign immunity in *Rahimtoola v. Nizam of Hyderabad* . . . I took more pains about it than any other case in which I have taken part. On coming back to it now, I would adhere to all I said then . . .<sup>5</sup>

Applying the very general test of the 'nature of the dispute', as laid down in his speech in *Rahimtoola's* case, it was necessary that the dispute . . .

should be concerned with property actually situate within the jurisdiction . . . or with commercial transactions having a most close connection with England, such that, by the presence of parties or the nature of the dispute, it is more properly cognizable here than elsewhere.<sup>6</sup>

Here, however, the transactions in question took place between foreigners and outside the jurisdiction, and the Pakistan courts were clearly the more appropriate forum. None of the four exceptions so enunciated applied, and the defendants were accordingly entitled to immunity. It may be noted that his Lordship made no reference to the *United States Shipping Board* case.

<sup>1</sup> [1938] A.C. 485 at 495-6, 519-20; this *Year Book*, 19 (1938), pp. 243-9.

<sup>2</sup> [1970] 1 Q.B. 289. The question of immunity was not, however, in issue here.

<sup>3</sup> [1974] 3 W.L.R. 269. Again, the Union of India did not plead immunity; the case is accordingly not authority for the proposition cited.

<sup>4</sup> Citing *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, (1964) 336 F. 2d 354.

<sup>5</sup> At pp. 1491-2.

<sup>6</sup> At p. 1492.

*Sovereign immunity—action in rem—State ownership without control—acts jure gestionis—immunity denied*

Case No. 13. *Wallem Shipping (Hong Kong) Ltd. and Another v. Owners of the Ship Philippine Admiral. The Philippine Admiral*, [1974] 2 Ll.L.R. 568, Hong Kong S.C.; [1976] 2 W.L.R. 214; [1976] 1 All E.R. 78, P.C. Writing in 1964, Dr. Bowett stated that it was 'only a matter of time before English courts will have to face this issue of whether sovereign immunity is general, or limited to so-called acts *jure imperii*'.<sup>1</sup> That issue arose in explicit form here, for the first time since *The Porto Alexandre*,<sup>2</sup> and the decision of the Privy Council, affirming the Hong Kong Supreme Court, is thus of very great interest.

The Philippine Admiral was a merchant ship owned by the Reparations Commission, an organ of the Philippine Government, and in the possession and control of the Liberation Steamship Company, a private Philippine corporation, under an arrangement for conditional sale.<sup>3</sup> At the time of the commencement of the actions here, the Company was in breach of the arrangement, and the Reparations Commission, having rescinded the contract, had an immediate right to repossess the ship. Various actions *in rem* against the ship were commenced for breach of charterparty by the company, and for repair costs and other disbursements incurred in Hong Kong. The Reparations Commission sought to have the writs set aside as impleading a foreign sovereign State. At first instance, Sir Geoffrey Briggs C.J. held that, although the ship was solely employed for private use, he was bound to accord immunity, having regard to *The Porto Alexandre*. On appeal, the Full Court unanimously, though for different reasons, refused to grant immunity: this decision was upheld by the Privy Council.

Three main issues arose in this case: firstly, whether the interest of the Philippine Government was sufficient to sustain a claim of immunity; secondly, whether immunity should be accorded to a government-owned merchant ship, and if not, whether the Philippine Admiral was such a ship; and thirdly, the relevance, if any, of a potential change of use by the claimant government.

On the first point, Huggins J., who delivered the leading judgment in the Supreme Court, relying in particular on *Republic of Mexico v. Hoffman*,<sup>4</sup> thought that . . .

there must be such interest (whether proprietary, possessory or other) that the claimant can fairly claim also the exercise of dominion over the vessel . . .<sup>5</sup>

The term 'dominion' was evidently used here in a rather special sense, since it is clear that the Reparations Commission remained at all times the legal owner of the ship. His Honour then went on to discuss the problem of 'public use',<sup>6</sup> apparently on the view that the two were separate aspects of the same problem. With respect, the question of the possessory or proprietary interest of a government, and the use to which the *res* is being put, are distinct problems—unless of course one takes the view that possession by a government is necessarily possession for public use;<sup>7</sup> which view is of course immediately fatal to any notion of restrictive immunity. This confusion was also apparent in the brief concurring opinion of Leonard J., who relied entirely on lack of

<sup>1</sup> *This Year Book*, 39 (1963), at p. 473.

<sup>2</sup> [1920] P. 30, C.A.

<sup>3</sup> The Arrangement was made pursuant to the Philippines Republic Act No. 1789 as amended, and finance was supplied by the Government of Japan pursuant to the Philippines-Japan Reparations Agreement of 9 May 1956: *United Nations Treaty Series*, vol. 285, p. 3.

<sup>4</sup> (1945) 89 L. ed. 729.

<sup>5</sup> [1974] 2 Ll.L.R. at p. 577.

<sup>6</sup> At pp. 577-8.

<sup>7</sup> Cf. Fitzmaurice, *this Year Book*, 14 (1933), at p. 121.

present control or possession by the Commission or the government to distinguish the present case from both *The Porto Alexandre* and *The Canadian Conqueror*.<sup>1</sup>

The test of control seems to me to be all important for a sovereign's dignity and the comity of nations does not seem to be so seriously imperilled if there is no interference with the sovereign's control.<sup>2</sup>

There was therefore no clear *ratio decidendi* in the Supreme Court. In the Privy Council, however, their Lordships were in no doubt on this point.

It is true that the Republic of the Philippines was not in possession or control of the *Philippine Admiral* at any relevant time and that it was not liable on any of the contracts for the breach of which the actions were brought; but the Republic was the legal owner of the vessel and what is more an owner with an immediate right to possession. In the *Dollfus Mieg* case<sup>3</sup> . . . , where the bars were in the possession of the bank and the arguments were conducted on the footing that the plaintiffs were their owners and that the foreign sovereigns had no title to them, the foreign sovereigns succeeded in having the action against the bank for detainment or conversion of the bars stayed on the ground that an order in favour of the plaintiffs would have interfered with the immediate right to possession of the bars which they had under the contract of bailment to the bank. There can be no difference for this purpose between gold bars and a ship and had their Lordships not thought that the fact that the *Philippine Admiral* was an ordinary trading ship took her outside the scope of the doctrine of sovereign immunity they would have held . . . that the Republic of the Philippines was entitled to have the actions stayed.<sup>4</sup>

Any other view would have been open to the criticism, expressed for example by Frankfurter J. in *Hoffman's* case, of making the principle of immunity dependent on minor distinctions of municipal law and fact as to the existence of 'possession' or 'control'.<sup>5</sup>

In considering the vexed question whether, in an action *in rem*, it is necessary to demonstrate public use, Huggins J. in the Supreme Court, quite properly, regarded the matter as not determined by general theories of immunity, or by vague notions of the 'dignity' of sovereigns: rather, the matter was to be determined by examining 'the practice of nations'.<sup>6</sup> 'With great hesitation',<sup>7</sup> and after an examination of British, American and Canadian authorities, his honour concluded that

immunity should not be granted in respect of vessels not destined for public use. We are not bound to hold that immunity should be granted.<sup>8</sup>

Both Huggins J. and the Judicial Committee were much influenced by the 'current of opinion' favouring restrictive immunity,<sup>9</sup> and their Lordships engaged in an extensive—though by no means comprehensive—survey of that practice.<sup>10</sup> None the less the crucial passage in their judgment is comparatively short:

Their Lordships now turn to consider what answer they should give to the main question raised by this appeal—whether or not they should follow the decision of the Court of Appeal in *The Porto Alexandre* . . . There are clearly weighty reasons for not

<sup>1</sup> [1962] Can. L.R. 598; this *Year Book*, 39 (1963), pp. 473-4.

<sup>2</sup> At p. 588.

<sup>3</sup> [1952] A.C. 582; this *Year Book*, 29 (1952), pp. 458-60.

<sup>4</sup> [1976] 2 W.L.R. at p. 234.

<sup>5</sup> (1945) 89 L. ed. 729, 737-8.

<sup>6</sup> [1974] 2 Ll.L.R. at p. 579.

<sup>7</sup> At p. 580.

<sup>8</sup> At p. 583.

<sup>9</sup> At pp. 582-3; [1976] 2 W.L.R. at p. 228.

<sup>10</sup> Their Lordships referred to the 1926 Brussels Convention, the Tate letter, and the 1972 European Convention on State Immunity, as well as to a number of text writers, and to a summary list of States favouring the opposing views. No reference was made, however, to the 1958 Geneva Conventions, or to any of the specialist literature.



following it. In the first place the court decided the case as it did because its members thought that they were bound so to decide by *The Parlement Belge* . . . whereas—as their Lordships think—the decision in *The Parlement Belge* did not cover the case at all. Secondly, although Lord Atkin and Lord Wright approved the decision in *The Porto Alexandre* the other three Law Lords who took part in *The Cristina* . . . thought that it was at least doubtful whether sovereign immunity should extend to state-owned vessels engaged in ordinary commerce. Moreover this Board in the *Sultan of Johore* case . . . made it clear that it considered that the question was an open one. Thirdly, the trend of opinion in the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transactions. Lastly, their Lordships themselves think that it is wrong that it should be so applied. In this country—and no doubt in most countries in the western world—the state can be sued in its own courts on commercial contracts into which it has entered and there is no apparent reason why foreign states should not be equally liable to be sued there in respect of such transactions. There is of course no clear cut dividing line between acts done *jure imperii* and acts done *jure gestionis* and difficult borderline cases may arise. *Republic of Congo v. Venne*<sup>1</sup> . . . is an example of such a case and others are given in the textbooks on international law . . . But similar difficulties arise under the ‘absolute’ theory, for there one has to decide whether the defendant—if not the foreign state itself—is or is not so closely connected with it as to make the action in substance one against the foreign state . . . The only reason for following *The Porto Alexandre* which appears to their Lordships to have much weight is that to apply the ‘restrictive’ theory to actions *in rem* while leaving actions *in personam* to be governed by the absolute theory would produce a very illogical result. The rule that no action can be brought against a foreign sovereign state on a commercial contract has been regularly accepted by the Court of Appeal in England and was assumed to be the law even by Lord Maugham in *The Cristina*. It is no doubt open to the House of Lords to decide otherwise but it may fairly be said to be at least unlikely that it would do so, and counsel for the respondents did not suggest that the Board should cast any doubt on the rule. So counsel for the appellant could and did argue with force that granted that the restrictive theory was to be preferred the courts should leave it to the government to ratify the 1926 and 1972 Conventions and to introduce the legislation necessary to make them part of our law and should not tamper with the law as so far declared in England by applying the restrictive theory to actions *in rem*. But their Lordships—while recognizing that there is force in that argument—are not prepared to accept it. Thinking as they do that the restrictive theory is more consonant with justice they do not think that they should be deterred from applying it so far as they can by the thought that the resulting position may be somewhat anomalous. For these reasons they propose not to follow *The Porto Alexandre* . . .<sup>2</sup>

With respect, this passage is both lucid and forceful, although it may be that their Lordships exaggerated the uniformity of the practice favouring the restrictive view, and underestimated the theoretical and practical difficulties of applying the *jure imperii/jure gestionis* distinction.<sup>3</sup> In this context it is interesting to note their remarks as to the place of executive suggestion in this field.

It is not suggested by counsel on either side that their Lordships should seek the help of the Foreign and Commonwealth Office in deciding this appeal by ascertaining which theory of sovereign immunity it favours. But it is not perhaps wholly irrelevant to observe that the later American case of *Rich v. Naviera Vacuba S.A.*<sup>4</sup> . . . suggests that if the courts consult the executive on such questions what may begin by guidance as

<sup>1</sup> 22 D.L.R. (3d.) 669.

<sup>2</sup> At pp. 232-3.

<sup>3</sup> Cf. Brownlie, *Principles of Public International Law* (2nd ed., 1973), pp. 319-27.

<sup>4</sup> (1961) 197 F. Supp. 710.

to the principles to be applied may end in cases being decided irrespective of any principle in accordance with the view of the executive as to what is politically expedient.<sup>1</sup>

Some of the more recent United States practice has also been open to this criticism; yet the willingness of United States courts to accede to State Department suggestions in the matter of immunity is a central feature of the restrictive immunity doctrine as enunciated, for example, in *Victory Transport*.<sup>2</sup> Critics of the restrictive view will no doubt remain unconvinced that in this matter the courts are a more appropriate forum than the executive.

Having accepted then the principle of restrictive immunity, their Lordships had little difficulty in determining that the Philippine Admiral was a trading vessel, *privatis usibus destinata*.

In order to answer that question one must consider both the past history of the vessel in question since she became the property of the foreign state and also the use to which she is likely to be put by that state in the future. Throughout her life the *Philippine Admiral* has been operated as an ordinary merchant ship earning freight by carrying cargoes and their Lordships agree with the judges in both courts below that the fact that *Liberation* was subject with regard to her to the provisions of the Reparations Law and the contract with the commission does not mean that she was not to be treated as an ordinary trading ship for the purposes of the doctrine of sovereign immunity when these proceedings started and also when the claim to stay them was made.<sup>3</sup>

The problem of change of use, which had disturbed the Supreme Court, was also regarded as of slight difficulty here, although in a different case 'difficult questions' might arise. In issue was the correctness of the decision in *The Canadian Conqueror*, where the trading vessels had actually been repossessed by the Cuban Government but had not been rededicated either to public or private use. Huggins J. regarded that decision as the operation of a 'rebuttable presumption that a vessel which is owned by, and at the disposal of, a sovereign state is in the public service'.<sup>4</sup> Their Lordships on the other hand . . . preferred not

to express either agreement or disagreement with that decision; for it is clearly distinguishable from this case on its facts. The vessels in question in that case had not been put to any use by the Cuban government since it had acquired them; they were available for use by that government in any way it chose; and having regard to the political conditions obtaining in Cuba at that time it was by no means improbable that they would be used for other than purely commercial purposes. Here on the other hand one has use for commercial purposes for many years while the government was the owner and no reason whatever to suppose that such user is going to change after the government has retaken possession from *Liberation*.<sup>5</sup>

If *The Canadian Conqueror* were to come up for decision again, the courts would no doubt require at least some evidence of future use before according immunity; since neither the application of presumptions nor speculation as to likely future use could be other than entirely arbitrary.

The position would appear then to be, at least in those Commonwealth jurisdictions which still accept Privy Council decisions as of final authority but probably also in England, that in actions *in rem* relating to property within the jurisdiction immunity

<sup>1</sup> At p. 229. But at p. 232 their Lordships emphasized an explanatory report presented to Parliament in 1972 which demonstrated governmental acceptance of the wisdom of restrictive immunity.

<sup>3</sup> At p. 233.

<sup>4</sup> [1974] 2 Ll.L.R. at p. 582.

<sup>2</sup> (1964) 336 F. 2d 354.

<sup>5</sup> At pp. 233-4.

will not be accorded governments directly interested in the *res*, where the action arises out of a course of commercial dealings with the *res*, at least in the absence of some evidence of the claimant government's ability and intention to convert the *res* to a different, public, use.

JAMES CRAWFORD

## B. PRIVATE INTERNATIONAL LAW\*

### *Currency in which judgment is expressed*

*Cases Nos. 1, 2, and 3.* It was for a long time accepted as axiomatic that an English court could not make an order for the payment of money expressed in a foreign currency: claims for payment of debts or of damages had to be converted into the currency of the *forum*. This was said to be a rule of procedure, but the justification for this classification was by no means clear, and the rule did not escape severe criticism.<sup>1</sup> When combined with the rule that the rate of exchange is to be taken at the date of breach rather than the date of judgment or the date of payment, it could obviously lead to an injustice if there was a fluctuation in the value of the *forum's* currency in the intervening period.

Three recent cases mark a new departure in the law. Those cases in chronological order of decision are *Schorsch Meier G.m.b.H. v. Hennin*,<sup>2</sup> *The Halcyon the Great*<sup>3</sup> and *Miliangos v. George Frank (Textiles) Ltd.*<sup>4</sup> The first two were decisions of the Court of Appeal and Brandon J. respectively: their significance must be assessed in the light of the last-mentioned, which was a decision of the House of Lords.

In the *Schorsch Meier* case the plaintiff, a German company, had supplied goods to the defendant in England. The defendant had made part payment in German currency. In February 1972 the plaintiff sent him a statement of account for DM. 3,756, being the balance owed and the sterling equivalent of which was then £452. The defendant did not pay. In July 1973, by which time the sterling equivalent of the sum owed had risen to £641, the plaintiffs brought an action in England for payment of the debt in deutschmarks. The Court of Appeal unanimously held that Article 106 of the Treaty of Rome,<sup>5</sup> made part of the law of the United Kingdom by the European Communities Act, 1972, required an English court to depart from common law tradition and, as the national court of a member State, to give judgment for a creditor residing in another member State in his own currency when this was the currency of the contract. The Court also held, although by a majority (Lord Denning M.R. and Foster J.), that the old rule could alternatively be discarded without reference to the Treaty of Rome. Lord Denning said: '... it is my opinion that, whatever the foreign currency, be it United States dollars or Japanese yen, or any other, the English courts can give judgment in that money when it is the currency of the contract'.<sup>6</sup> Lawton L.J.,

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<sup>1</sup> See, e.g., Dicey and Morris, *The Conflict of Laws* (9th ed., 1973), p. 883.

<sup>2</sup> [1975] Q.B. 416.

<sup>3</sup> [1975] 1 W.L.R. 515.

<sup>4</sup> [1975] 3 W.L.R. 758. See, too, *Jugoslavenska Oceanska Plovidba v. Castle Investment Co. Inc.*, [1974] Q.B. 292.

<sup>5</sup> Art. 106 provides: 'Each member state undertakes to authorise, in the currency of the member state in which the creditor . . . resides, any payments connected with the movement of goods, services or capital, . . . to the extent that the movement of goods, services, capital and persons between member states has been liberalised pursuant to this Treaty.'

<sup>6</sup> [1975] Q.B. 416, 427.



however, although disapproving the old rule in strong terms, felt himself bound by the House of Lords' relatively recent reaffirmation of it in *In re United Railways of Havana and Regla Warehouses Ltd.*<sup>1</sup> That was a case of a money debt in U.S. dollars due under a contract the proper law of which was the law of Pennsylvania. The debtor was English, and the creditor was American. The House of Lords held unanimously that the provable sum in U.S. dollars had to be converted into sterling at the rates of exchange prevailing when the relevant sums fell due and were not paid. It rejected the argument that conversion should be made at the date of judgment. Nor could their Lordships accept the suggestion that a different rule applied in the case of a money debt as distinct from a claim for damages for tort or breach of contract.

In *The Halcyon the Great*<sup>2</sup> the mortgagees of a ship brought an action *in rem* against her for the recovery of sums in U.S. dollars under their three mortgages on the ship. The transactions had been expressed in U.S. dollars. The plaintiffs had obtained an order for the sale of the ship by the Admiralty Marshal pending suit. Brandon J. allowed their further application for an order that the ship be sold for a price in U.S. dollars and that the proceeds of the sale should, subject to the availability of Treasury consent under exchange control regulations, be held in a separate dollar account at the Bank of England in the Marshal's name and without prior conversion into sterling.

In support of their application the plaintiffs had contended that, if their substantive claim were to be successful, they would then be entitled to be paid in dollars. In this connection they relied upon the alternative ratio of Lord Denning M.R. and Foster J. in the *Schorsch Meier* case. However, at the time of Brandon J.'s hearing of their application the case of *Miliangos v. George Frank (Textiles) Ltd.*<sup>3</sup> had already been heard before Bristow J., who had refused to follow the majority holding in the *Schorsch Meier* case. Like Lawton L.J. in that case, he had taken the view that it was not consistent with prior authority: Bristow J. referred in particular to *Manners v. Pearson & Son*<sup>4</sup> and *In re United Railways of Havana and Regla Warehouses Ltd.*<sup>5</sup> In *The Halcyon the Great* Brandon J. was able to side-step the dilemma which this tangle of precedent presented. In dealing, as he was, with interlocutory applications, he found it 'sufficient to say that, having regard to the majority decision of the Court of Appeal [in *Schorsch Meier*], which is *prima facie* binding on this court, the plaintiffs have at least an arguable case that they and Hambros Bank Ltd. will be entitled, if their claims succeed, to judgments in dollars, and I approach the question how I should exercise my discretion on the plaintiff's present applications on that basis'.<sup>6</sup> His Lordship anticipated that the dilemma might have been resolved by a further decision of the Court of Appeal or by a decision of the House of Lords before the substantive issue in the instant case came to be decided.

In the event the Court of Appeal subsequently reversed Bristow J.'s decision in *Miliangos v. George Frank (Textiles) Ltd.*<sup>7</sup> The House of Lords<sup>8</sup> castigated this reversal as improper having regard to the state of the authorities binding upon the Court of Appeal, but the House itself exercised its prerogative to overrule its own previous decisions by overruling *In re United Railways of Havana and Regla Warehouses Ltd.* (and by implication decisions in accord with it), and affirmed the actual decision of the Court of Appeal. The House of Lords decision will undoubtedly be seen as a turning-point in this branch of the law. In this sense it is an important case, but the scope of the decision itself is circumscribed.

<sup>1</sup> [1961] A.C. 1007.

<sup>2</sup> [1976] 1 W.L.R. 515.

<sup>3</sup> [1975] 2 W.L.R. 555.

<sup>4</sup> [1898] 1 Ch. 581.

<sup>5</sup> [1961] A.C. 1007.

<sup>6</sup> [1976] 1 W.L.R. 515, 513.

<sup>7</sup> [1975] Q.B. 487.

<sup>8</sup> [1975] 2 W.L.R. 758.

The facts of *Miliangos v. George Frank (Textiles) Ltd.* were as follows. A Swiss seller agreed to supply English buyers with goods at a price in Swiss francs. The goods were delivered, but the price was not paid: bills of exchange drawn in Switzerland and accepted by the buyer were dishonoured. In English proceedings the seller in amended pleadings asked for judgment in Swiss francs as an alternative to claiming judgment in sterling. The House of Lords (Lord Simon of Glaisdale dissenting) held that an English court is entitled to give judgment for a sum of money expressed in a foreign currency in the case of an obligation of a money character to pay foreign currency under a contract, the proper law of which is that of a foreign country, and when the money of account is the currency of that country or possibly of some other country but not of the United Kingdom. The House of Lords held that the claim has to be specifically for foreign currency or its sterling equivalent, and that conversion will be at the date when the court authorizes enforcement of the judgment in terms of sterling.

Three limitations upon the extent of this new departure are to be observed.

First, it is confined to claims for foreign money obligations. The question of its possible extension to claims for damages for breach of contract or for tort was expressly left open by Lord Wilberforce<sup>1</sup> and by Lord Cross of Chelsea.<sup>2</sup> Lord Edmund-Davies seemingly took the same view, but Lord Fraser of Tullybelton, the fourth member of the majority, did say: 'I would add that I am not entirely satisfied that difficulty, and even injustice, may not occur if the rule continues to be that damages are converted at the breach date while foreign debts are converted at the date of payment. In the instant case, if the defendant's counterclaim had been successfully maintained, the question might have had to be decided. As things are, it does not arise, and I agree that it is not necessary or appropriate to consider cases other than foreign debts.'<sup>3</sup>

Secondly, it is clear that the claim itself must be specifically for the sum in foreign currency or the sterling equivalent, the crucial point, of course, being that the conversion date is the date when leave to enforce in sterling is given.

Thirdly, the obligation must have arisen under a transaction the proper law of which is foreign, and the money of account must be the money of that country or, as Lord Wilberforce put it, 'possibly of some other country but not of the United Kingdom'.<sup>4</sup> The application of the proper law as the *lex causae* involves rejection of the legend that the matter pertains to procedure and should therefore be governed by the *lex fori*. Lord Wilberforce said: 'it must surely be wrong in principle to allow procedure to affect, detrimentally, the substance of the creditor's rights.'<sup>5</sup> Of course, as Lord Edmund-Davies pointed out, there will come a stage when a judgment, even if expressed in a foreign currency, will be converted into sterling for the purposes of execution, but 'the core of this litigation is not in reality whether judgment given by the courts of this country must always be expressed in sterling', but the 'real question arising in this appeal' is as to 'the proper date to take for the purpose of converting into sterling the amount of foreign currency found due from the defendant'.<sup>6</sup> In the conflict of laws a matter should only be characterized as procedural, with the consequential exclusion of the *lex causae*, if impelling considerations of convenience to the *forum* demand it. Clearly there is no such consideration requiring conversion at one rate of exchange rather than another.

It may be further noted by way of postscript that some of their Lordships entertained grave doubts about the Court of Appeal's reliance in the *Schorsch Meier* case upon Article 106 of the Treaty of Rome. Lord Wilberforce said '... I feel bound to

<sup>1</sup> Ibid., 771.

<sup>2</sup> Ibid., 799.

<sup>3</sup> Ibid., 803.

<sup>4</sup> Ibid., 771.

<sup>5</sup> Ibid., 769.

<sup>6</sup> Ibid., 799.



say that I entertain the strongest reservations concerning the use made by the Court of Appeal of Article 106 in the present context . . .',<sup>1</sup> and both Lord Cross<sup>2</sup> and the dissenting Lord Simon of Glaisdale agreed.<sup>3</sup>

### *Foreign nationality laws*

*Case No. 4.* Some comments upon the case of *Oppenheimer v. Cattermole*<sup>4</sup> when it was before the Court of Appeal have already been offered in an earlier volume of this *Year Book*.<sup>5</sup> The House of Lords has now affirmed the Court of Appeal's decision but on different grounds.

A taxpayer, a German Jew, had emigrated to England in 1939 as a result of Nazi persecution and had in 1948 become a naturalized British subject. From 1953 onwards he was paid an annual pension by the Federal German Republic. He claimed exemption from United Kingdom tax on his pension during the years 1953/68 under a double taxation agreement on the ground that he had dual British and German nationality. There was no doubt that he had acquired British nationality: the question was as to whether he also had German nationality. A German law passed in 1941 provided that 'A Jew whose usual place of abode is abroad may not be a German citizen . . . A Jew loses German citizenship if, at the date of the entry into force of this regulation, he has his usual place of abode abroad.' The Court of Appeal<sup>6</sup> accepted the established principle that whether a person is a national of a country must be determined by reference to the municipal law of that country, and held that there was no doubt that by German law the taxpayer had lost his German nationality in 1941. It was there contended that the German law of 1941 ought to be disregarded on two grounds: (1) that it was penal or confiscatory, and (2) that for reasons of public policy English law will not recognize in respect of an enemy alien any change of his nationality effected by his domestic law in time of war. The former contention was rejected. So far as the latter contention was concerned the Court of Appeal held that, although English courts may in wartime refuse to recognize laws passed in a foreign country purporting to alter the status of enemy aliens in England, this principle ceases to operate at the end of the war.

The taxpayer appealed to the House of Lords, where, after the conclusion of submissions, it became apparent that there were grounds for thinking that the findings of the Special Commissioners as to German law might have been based upon inadequate evidence, and in particular that Article 116 (2) of the Basic Law of the Federal German Republic enacted in 1949 might be relevant. The case was remitted to the Special Commissioners, and the appeal was then restored for further argument. At the same time an appeal by another taxpayer, which raised *inter alia* the same point as to nationality, was heard. Article 116 (2) of the Basic Law provides: ' . . . (2) Former German citizens who were deprived of their German nationality between January 30, 1933, and May 8, 1945 for political, racial or religious reasons, and their descendants, are to be renaturalised on application. They shall be considered as not having been deprived of their nationality, provided they have taken up their residence in Germany since May 8, 1945, and have not expressed any wish to the contrary.' The House of Lords held that on the true construction of this Article the appellant taxpayers had ceased to be German nationals unless and until they applied to be such, which they had

<sup>1</sup> [1975] 2 W.L.R., 768.

<sup>2</sup> *Ibid.*, 799.

<sup>3</sup> *Ibid.*, 779.

<sup>4</sup> [1973] Ch. 264 (C.A.): 2 W.L.R. 347 (H.L.).

<sup>5</sup> This *Year Book*, 46 (1972-3), pp. 430-2.

<sup>6</sup> Buckley and Orr L.J.J. Although the actual decision of the Court of Appeal was unanimous, the reasoning of Lord Denning M.R. differed in some respects.



not done. As Lord Salmon put it, 'It was not the odious Nazi decree of 1941 but his own failure to apply in time under the benevolent Article 116 (2) of the Basic Law enacted in 1949 which deprived him of exemption from United Kingdom income tax for the tax years in question.'<sup>1</sup> Their Lordships were indeed unanimous in explicitly avoiding reliance upon the 1941 law. However, the position is not free from difficulty, and Lord Cross conceded that 'it may look at first sight odd that a man who had not lost his German nationality by the 1941 decree should lose it in 1949 under the operation of the Basic Law', but he continued: 'this apparent oddity disappears if one bears in mind the conflicting considerations which the framers of the Basic Law had to try to reconcile. On the one hand, they were unwilling to admit that the 1941 decree had ever been part of the law of Germany, but at the same time they did not wish to thrust German nationality on people who did not want it. As a compromise—if one reads the Basic Law as the Federal Constitutional Court read it—they drew a line at the date of the enactment of the Basic Law. Up to that date people who fell within the scope of the 1941 decree retained their German nationality unless they had given some positive indications that they rejected it; but after the date of the coming into force of the new constitution it was up to the persons concerned to give some positive indication that they wished to be nationals of the new Germany either by living there or by applying for German nationality.'<sup>2</sup>

The problems raised by the 1941 law and the way in which the Court of Appeal had endeavoured to deal with them were rendered irrelevant by the fact that before the years of the disputed tax assessment these problems had in effect been tackled by the German legislature in the Basic Law of 1949. In the circumstances the English court had merely to apply that law. However, Lord Cross, who delivered the leading judgment in the House of Lords with which their Lordships expressed general agreement, did let fall some considered *obiter dicta* as to what the position would have been had the state of German law been as the Court of Appeal had supposed it to be. These *dicta* raise several interesting questions of principle.

First, Lord Cross reaffirmed the rule that English courts will not recognize a change in the status of an enemy alien effected during wartime. The scope of this rule is not confined to changes effected by laws actually passed by the enemy State during the war, but would also extend, for example, to the case of an enemy alien marrying a national of the U.K. or of a third State during the war and thus losing his nationality under a law of the enemy State enacted before the war. The rule constitutes an exception to the general principle that a country determines who are, and who are not, its own nationals. It is an exception based upon public policy, but this is not exclusively related to the possibly offensive nature of the particular foreign law: it depends upon a broader national policy concerning the classification and position of enemy aliens resident in England in time of war. It is this broader policy that dictates the limitations of the rule. One probable such limitation is that non-recognition of the foreign law may not apply to certain matters totally unconnected with the conduct of the war. One certain limitation is that the rule will cease to operate once the war is over. Lord Cross inclines to the view that the end of the war for this purpose 'should be interpreted in a common sense way as until the end of the fighting'.<sup>3</sup>

Secondly, Lord Cross indicated that he would have been unwilling to withhold recognition of the 1941 decree on the ground that it was confiscatory: his Lordship does not consider separately the possibility of the 1941 decree being characterized as penal. This, with respect, would seem to be unexceptionable.

<sup>1</sup> [1975] 2 W.L.R. 347, 375.

<sup>2</sup> *Ibid.*, 363.

<sup>3</sup> *Ibid.*, 367.

Thirdly, his Lordship considers the problem from the standpoint of consistency or otherwise with 'international law'. It is in this context that his principal reference to the possibility of non-recognition on the grounds of public policy occurs. In this part of Lord Cross's judgment the distinction between public international law and English private international law is (perhaps unavoidably) somewhat blurred. He seems to accept that there is no mandate of public international law requiring a State to recognize in all circumstances another State's granting or withdrawing nationality. At the same time, 'A judge should, of course, be very slow to refuse to give effect to the legislation of a foreign State in any sphere in which according to accepted principles of international law, the foreign State has jurisdiction',<sup>1</sup> for 'it is part of the public policy of this country that our courts should give effect to clearly established rules of international law';<sup>2</sup> but Lord Cross admits that 'Of course on some points it may be by no means clear what the rule of international law is'.<sup>3</sup> His Lordship then proceeds to deal with the 1941 law as follows: 'But what we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the State passing legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognize it as a law at all.'<sup>3</sup> In reaching this conclusion Lord Cross was, of course, differing from the Court of Appeal.<sup>4</sup>

There is nothing new in an English *forum* refusing to apply or to recognize an otherwise appropriate rule of foreign law on the grounds of public policy. As has been emphasized many times, resort to public policy in international fact situations should be made very sparingly, but the content of a foreign rule may be so intrinsically repulsive that neither its application nor its recognition can be countenanced in an English *forum*. What is abnormal, if not novel, in Lord Cross's approach is to see this English private international law doctrine in direct relationship with another, and possibly overriding, rule of 'public policy' requiring compliance with the precepts (albeit sometimes uncertain) of public international law. The frontier between monism and dualism seems to have been crossed.

Lord Cross therefore concluded, as did Lord Hailsham of St. Marylebone, Lord Hodson and Lord Salmon, that had the relevant German law been what it was assumed to be when the appeal was first argued, the appeal would also have been successful.

It is a matter for final remark that the discovery that the state of German law had been misconceived in the Court of Appeal stemmed from a powerful article<sup>5</sup> published in a law journal after the Court's decision, which article was itself seemingly provoked, at least in part, by journalistic comment in a newspaper.

### *Polygamous marriages and bigamy*

*Case No. 5.* In 1946 in *Baindail v. Baindail*<sup>6</sup> the Court of Appeal decided that a subsisting valid polygamous marriage constitutes a bar to a party to it entering into a subsequent monogamous marriage.<sup>7</sup> Such a monogamous marriage would be void:

<sup>1</sup> [1975] 2 W.L.R. 368.

<sup>2</sup> *Ibid.*, 368-9.

<sup>3</sup> *Ibid.*, 369.

<sup>4</sup> On this point Lord Pearson would have agreed with the Court of Appeal.

<sup>5</sup> F. A. Mann, 'The Present Validity of Nazi Nationality Laws', *Law Quarterly Review*, 89 (1973), p. 194.

<sup>6</sup> [1946] P. 122.

<sup>7</sup> There may be some doubts as to the exact limits of this rule. In the *Baindail* case the second marriage had taken place in England, but presumably it would have made no difference had it taken place abroad, unless it would have been valid by the *lex loci celebrationis* and by the personal laws of the parties at the time when it was entered into.



but the court expressly left open the question as to whether it would also be criminally bigamous. Later, in *R. v. Sarwan Singh*<sup>1</sup> the assistant Recorder of West Bromwich answered this question in the negative, because he had 'formed the clear view that the marriage which is to be the foundation for a prosecution for bigamy must be a monogamous marriage, and that any polygamous marriage, or any potentially polygamous marriage, cannot afford a foundation for the prosecution'.<sup>2</sup> In the report of the recent Court of Appeal case of *R. v. Sagoo*<sup>3</sup> the headnote states that *R. v. Sarwan Singh* is overruled. This statement, although in one sense true, could be misleading.

The facts of *R. v. Sagoo* were as follows. The defendant, a Sikh whose domicile of origin was in Kenya, had entered into a valid polygamous marriage there. Subsequently, the Kenya Hindu Marriage and Divorce Ordinance was passed prohibiting prospective polygamy by providing that, if either party to a marriage married again during the subsistence of that marriage, such second marriage would be void, and he or she could be prosecuted for bigamy. Thus by Kenya law the defendant's marriage, although remaining valid, was in effect converted into a monogamous marriage. Some time later, the defendant, having acquired a domicile of choice in England, went through a monogamous ceremony there with a third party. It was that ceremony which was the subject matter of a charge of bigamy under Section 57 of the Offences Against the Person Act, 1861. This Section provides: 'Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony . . .' James L.J. delivering the judgment of the Court of Appeal, held that the defendant's Kenya marriage was, at the time he went through the second ceremony of marriage, within the meaning of the words 'being married'. His appeal against conviction was therefore dismissed.

The Court held that at the time of the second marriage the first marriage, although polygamous at its inception, had already become monogamous. This mutation had apparently been doubly brought about; first by virtue of the change in Kenya law, and secondly by virtue of the defendant's acquisition of a domicile of choice in England, a monogamous country.

It is now well established that a change in the nature of a marriage which is wrought by, or is in accord with, the *lex loci celebrationis*, the law governing the original nature of the marriage, will be recognized in England.<sup>4</sup> The fact that the defendant's marriage had become monogamous by Kenya law before he purported to marry again in England would have been sufficient to dispose of the case. In these circumstances, it was not only unfortunate but also unnecessary for the court to place any reliance upon the circumstance that he had become domiciled in England: unnecessary, because, given the change in Kenya law, it would have made no difference had he still been domiciled in Kenya; unfortunate because it involved the Court of Appeal in following the much criticized decision of Cumming-Bruce J. in *Ali v. Ali*.<sup>5</sup> There it was held that the acquisition of a domicile of choice in England in itself converts a person's polygamous union into a monogamous one, without reference to the *lex loci celebrationis*. In an earlier volume of this *Year Book* the present writer has ventured to point to some of the difficulties to which this doctrine could give rise.<sup>6</sup> Would it have made any

<sup>1</sup> [1962] 3 All E.R. 612. See this *Year Book*, 38 (1962), p. 483.

<sup>2</sup> [1962] 3 All E.R. 612, 615.

<sup>3</sup> [1975] 3 W.L.R. 267.

<sup>4</sup> See, e.g., *Cheni v. Cheni*, [1965] P. 85 and *Parkasho v. Singh*, [1968] P. 233; also the *Sinha Peerage Claim*, 171 Lords' Journals 350.

<sup>5</sup> [1968] P. 564.

<sup>6</sup> This *Year Book*, 41 (1965-6), p. 442.



difference in *Ali v. Ali* if a second wife had in fact been taken before the parties acquired their English domicile? Does the doctrine of mutation by virtue of change of domicile apply only when the change is to domicile in a monogamous country? Or does it also mean that, for example, English domiciliaries who marry in England can become polygamists by acquiring a domicile of choice in a polygamous country? The learned editor of *Dicey and Morris* has pointed out that the principle of *Ali v. Ali* is 'a far reaching one' and that 'it may not be very logical and is difficult to reconcile with prior authority, notably with *Hyde v. Hyde*<sup>1</sup> itself', but contends that 'it is to be welcomed on practical grounds because it narrowed the scope of that decision'.<sup>2</sup> With the statutory abrogation of the rule in *Hyde v. Hyde* even this somewhat cynical justification is no longer available. Moreover, additional difficulties to which *Ali v. Ali* may give rise are introduced by the new statutory capacity of a wife to have a domicile separate from that of her husband. What, for example, will the position be if one polygamously married spouse acquires a domicile in a monogamous country, but the other does not? Or suppose that the husband and one, or some, but not all, of his wives acquire such a domicile? It is submitted with respect but confidence that recognition of mutation should be limited to cases in which such mutation is pursuant to, or consistent with, the *lex loci celebrationis*. Parties to a marriage should at the outset be able to ascertain by reference to what legal system the nature of their union will for ever be judged: so far as its polygamous or monogamous quality is concerned the reference is to the *lex loci celebrationis*; and the control of that law should be inescapable in the sense that only subsequent mutation consistent with it should be recognized. All the English cases except *Ali v. Ali* are explicable in terms of this proposition. *Ali v. Ali* could have been seen in historical, legal and social perspective as an anomalous first-instance mitigation of an unmeritorious rule, which rule has now itself been swept away by Parliament. It is a matter for regret that the Court of Appeal's gratuitous alternative reasoning in *R. v. Sagoo* now renders this the more difficult.

There is, however, a further and more fundamental objection to *R. v. Sagoo*. This stems from the Court of Appeal's acceptance of the assertion made in *R. v. Sarwan Singh*, 'that the marriage which is to be the foundation for a prosecution for bigamy must be a monogamous marriage'.<sup>3</sup> In that case the assistant Recorder had clearly been influenced by what he referred to as 'a very powerful argument' that to hold otherwise would give rise to the possibility that 'a man who married under a ceremony of polygamy a second wife might in some circumstances be liable for prosecution for bigamy; and I cannot believe that the criminal law and those who framed the statute under which the offence of bigamy was constituted ever contemplated that such a position could properly arise'.<sup>4</sup> With all respect this argument is misconceived. Of course, it is highly unlikely that Parliament intended that a person contracting a second but valid polygamous marriage abroad should thereby lay himself open to prosecution for bigamy in England. But this is because the second marriage would be valid, not because the first was polygamous: obviously nobody is going to be convicted of bigamy for contracting a marriage, polygamous or monogamous, which is recognized in England as constituting a valid marriage.<sup>5</sup> The real question, and a question upon which the argument which seems to have swayed the learned assistant Recorder has

<sup>1</sup> (1866) L.R. 1 P. and D. 130.

<sup>2</sup> Dicey and Morris, *The Conflict of Laws* (9th ed., 1973), p. 283.

<sup>3</sup> [1962] 3 All E.R. 612, 615. See *supra*.

<sup>4</sup> [1962] 3 All E.R. 612, 615.

<sup>5</sup> The phrase 'shall marry' in Section 57 clearly means 'shall attempt to marry'.

no direct bearing, is whether an attempted marriage, which is invalid owing to the subsistence of an earlier polygamous marriage, can be criminally bigamous. The reasoning in *R. v. Sarwan Singh* confuses consideration of the monogamous or polygamous nature of the first marriage with questions of validity of the second marriage. Provided the second marriage would be regarded in England as invalid on account of a prior subsisting marriage (as was undoubtedly the case in *R. v. Sarwan Singh* and in *R. v. Sagoo*) it is difficult to see why the criminality of going through the second ceremony should turn upon the monogamous or polygamous nature of that earlier valid subsisting marriage. Had the prior marriage been monogamous, although foreign, there is no doubt that the defendant could have been liable to prosecution for bigamy for attempting a second marriage in England. What precept of principle, statutory construction or policy, it may be legitimately asked, justifies a differing result simply and solely because the prior marriage was polygamous?

It is somewhat paradoxical that the Court of Appeal in *R. v. Sagoo* should state that 'It is highly desirable that the criminal law and family law should be the same in the recognition of the status created by a marriage',<sup>1</sup> but should see fit to accept a proposition which asserts that one and the same English ceremony is civilly void for bigamy but criminally not bigamous. It is to be noted, too, that this attitude constitutes a blemish upon the marked liberal trend, manifested by the courts over the last hundred years and more recently by the legislature,<sup>2</sup> towards eliminating discrimination between the legal significance accorded to valid polygamous and to valid monogamous unions.

To treat a marriage as invalid but not criminally bigamous could lead to some curious situations. Suppose, for example, a man were to enter into a valid polygamous marriage and during its subsistence he were to go through a succession of monogamous marriage ceremonies. It would seem that none would be criminally bigamous. He could not be convicted of marrying during the lifetime of a previous monogamous 'spouse' because all the monogamous ceremonies were void. If the *Sarwan Singh* doctrine, now accepted in *Sagoo*, is correct, he presumably could not be convicted of marrying during the lifetime of his polygamous spouse after a second or third monogamous marriage any more than after the first.<sup>3</sup>

It is clear that the Court of Appeal in *R. v. Sagoo* has overruled *R. v. Sarwan Singh* as a decision in that, as James L.J. put it, 'the recorder misdirected himself by applying the principle of "once polygamous always polygamous"'. It is unfortunately equally clear that the Court, far from rejecting the basic rule propounded there for the first time, namely that 'the marriage which is to be the foundation for a prosecution for bigamy must be a monogamous marriage', has placed its *imprimatur* upon it.

### *Foreign nullity decrees*

*Case No. 6.* In England, although both the rules governing the assumption of jurisdiction in proceedings for divorce, legal separation and nullity, and the rules governing the recognition of foreign divorces and legal separations, are now governed by statute,<sup>4</sup> the rules relating to the recognition of foreign nullity decrees are still based upon common law principles.

<sup>1</sup> [1975] 3 W.L.R. 267, 271.

<sup>2</sup> Matrimonial Proceedings (Polygamous Marriages) Act, 1972.

<sup>3</sup> See J. A. Andrews, *Criminal Law Review*, 1963, p. 261 at p. 263. It may well be that he would often be open to prosecution for some other offence, such as knowingly and wilfully making a false declaration, under the Perjury Act, 1911, Section 3; but this circumstance hardly makes for the rationality or elegance of the law of bigamy.

<sup>4</sup> Domicile and Matrimonial Proceedings Act, 1973.



However, there has traditionally been in matrimonial causes generally a shadowy relationship of reciprocity between the bases upon which jurisdiction is assumed and the bases upon which its assumption abroad is recognized. Although this has been more marked in the area of divorce, the possibility of a spin-off from the new statutory nullity jurisdictional rules into the law relating to recognition could not be ruled out. Moreover, the newly acquired capacity of a wife to have a domicile separate from her husband was almost bound to provoke a reconsideration of the rule that a foreign decree of nullity pronounced by,<sup>1</sup> or recognized in,<sup>2</sup> the court of the hitherto common domicile will be recognized in England. In short the intense statutory activity of recent years could clearly have indirect effects upon the common law rules relating to the recognition of foreign nullity decrees.

The wind of change seems, however, to have blown from a quite different quarter. In *Law v. Gustin*<sup>3</sup> Bagnall J., sitting at first instance, has revealed for the first time that the principle of *Indyka v. Indyka*<sup>4</sup> finds a place in the common law relating to the recognition of nullity decrees. The facts of *Law v. Gustin* were as follows. British subjects domiciled and resident in England, married in 1966. In December 1967 the wife left the matrimonial home and eventually she wrote to her husband from the United States stating that she had no intention of returning to him or to England and that she was living in Kansas with a Kansas citizen. In November 1968 she presented a petition to a Kansas court in which she asked for a decree of nullity on the ground that her husband had by his fraudulent conduct induced her to go through a marriage ceremony when he had no intention to consummate the marriage. In January 1969 a decree of nullity was pronounced. Later the wife married the Kansas citizen and had remained in Kansas.

Subsequently the husband successfully petitioned an English court for a declaration that the Kansas decree was valid. Bagnall J. held that the wife by settling in Kansas with a native of that State, whom she subsequently married, had established a real and substantial connection with the State of Kansas so as to bring the doctrine of *Indyka v. Indyka* into play. The learned judge seems to have entertained no doubt that, although the doctrine of *Indyka* had in fact never been applied in a nullity case before, no distinction could in this context be drawn between nullity and divorce. The result is somewhat paradoxical in that the short-lived significance of the *Indyka* doctrine in divorce has already been terminated, except when investigating the validity of a divorce granted in the British Isles before 1 January 1972. What is perhaps more important is that, if Bagnall J.'s somewhat cursory decision in *Law v. Gustin* should become part of the fabric of the common law relating to the recognition of foreign nullity decrees, it will in practice tend to render irrelevant most of the doubts which have been provoked as to the possible indirect effects of recent statutory activity in related areas upon the established common law rules. The broad significance of this is emphasized by a consideration of the facts of the case. It would seem that approximately one year's residence in a foreign country, with which there was no previous contact, coupled with the formation of an intention not to return to England, was held to constitute a real and substantial connection. This is indeed a far cry from the situation in *Indyka v. Indyka* itself. Mrs. Indyka was a Czech national, domiciled and resident throughout her life in Czechoslovakia; she married another Czech in Czechoslovakia and set up her matrimonial home there; indeed, there was no evidence that she had ever left Czechoslovakia.

<sup>1</sup> *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641.

<sup>2</sup> *Abate v. Abate*, [1961] P. 29.

<sup>3</sup> [1975] 3 W.L.R. 843.

<sup>4</sup> [1969] 1 A.C. 33.



*Indyka v. Indyka* and the cases which have followed it, including *Law v. Gustin*, must be of no less interest to the student of the evolutionary techniques of the common law than they are to the student of the conflict of laws.

*Submission to the jurisdiction of a foreign court*

*Case No. 7.* One of the cases in which a foreign court has jurisdiction to give a judgment *in personam* capable of recognition and enforcement in England is that in which the party resisting such recognition or enforcement submitted to its jurisdiction. In principle such submission must have been voluntary. Voluntariness is a notoriously difficult concept in many parts of the law. The notion of submission is also a complex one.

To the question 'If a party appears simply and solely to deny that a foreign court has jurisdiction, does he thereby voluntarily submit to its jurisdiction?', the bluff common-sense answer would be a robust negative. But, as frequently happens, a crudely over-generalized question provokes a crudely over-generalized answer.

Suppose, for example, that there is a clear rule of law in the foreign *forum* that if a party appears, even though he does so only wishing to protest the jurisdiction, he is irrebuttably deemed to have appeared generally. When a party, knowing this to be the position, nevertheless appears purporting only to protest the jurisdiction, do the precepts of common sense really require that he cannot be held to have submitted voluntarily?

Again, it is generally accepted that submission cannot be partial, in the sense that the defendant cannot agree to the court's determining some issues but not others: he cannot pick and choose. Why should an exception to this rule be made in the case of one particular issue, namely that as to whether the court was in its own eyes competent to hear the merits of the case?

In the recent case of *Henry v. Geopresco International Ltd.*<sup>1</sup> the Court of Appeal was able and willing to recoil from deciding whether or not appearance in a foreign court solely to protest the jurisdiction of that court amounts to a voluntary submission to its jurisdiction. It is a question which in the words of Roskill L.J., who delivered the judgment of the court, 'has, curiously enough, never been finally and authoritatively decided in the English courts'.<sup>2</sup>

The facts of *Henry v. Geopresco International Ltd.* were thus. The plaintiff, a Canadian resident in Alberta, had entered into a service agreement in Canada with the defendant company, which was registered in Jersey, had its head office in London, but had no branch or assets in Canada. The contract was to be governed by English law and contained an arbitration clause. The defendants later dismissed the plaintiff summarily. He commenced an action for wrongful dismissal in the Supreme Court of Alberta and, with leave of the Court, served a statement of claim on them in Jersey. The defendants then applied by motion to the Supreme Court of Alberta for an order to set aside service out of the jurisdiction on the grounds that the affidavit in support of the motion was defective and that Canada was not the *forum conveniens*; in the alternative they sought a stay of proceedings on the ground of the arbitration clause. The notion was dismissed, and this was upheld by the Alberta Court of Appeal. Thereafter, the defendant company took no part in the proceedings. The plaintiff obtained judgment in default and was awarded damages. In an action in England to enforce this judgment the defendants pleaded that they had not submitted to the

<sup>1</sup> [1975] 3 W.L.R. 620.

<sup>2</sup> [1975] 3 W.L.R. 620, 637.

jurisdiction of the Alberta court. The English Court of Appeal, reversing Willis J., held that there had been a voluntary appearance.

It is, of course, well established that a submission, even on a preliminary issue (whether of fact or law), to a foreign court may constitute a submission on the merits, and that if a party loses on that issue he cannot thereafter challenge the jurisdiction of the court to adjudicate upon the remaining issues. In the instant case the defendants had in the alternative submitted that the arbitration clause was a *Scott v. Avery*<sup>1</sup> clause. This was an invitation to adjudicate upon part of the defence. It clearly constituted submission, and this would, it seems, have been enough to dispose of the case.<sup>2</sup>

The interest of the case lies in the Court of Appeal's holding that, even in the absence of the alternative attempt to stay the Alberta proceedings on the ground of the arbitration clause, the defendant had voluntarily submitted. The Court laid down the rule that 'English courts will enforce the judgment of a foreign court against a defendant over whom the court had jurisdiction by its own local law (even though it does not possess such jurisdiction according to the English rules of conflict of laws) if that defendant voluntarily appears before that foreign court to invite that court in its discretion not to exercise the jurisdiction which it has under its own local law.'<sup>3</sup> The Court saw *Harris v. Taylor*<sup>4</sup> as binding authority for such a proposition. It refused to accept the oft-cited *dicta* to the contrary in *In re Dulles' Settlement (No. 2)*,<sup>5</sup> disapproved *Daarnhouwer & Co. Handelmaatschappij N.V. v. Boulos*<sup>6</sup> and rejected criticisms of *Harris v. Taylor* voiced by the editors of *Dicey and Morris*<sup>7</sup> and in various editions of *Cheshire*.<sup>8</sup>

The Court seemingly regarded the case before it as virtually indistinguishable from *Harris v. Taylor*. There the defendant had been served in England with a writ issued in the Isle of Man. The defendant had sought to set aside this service on three grounds, namely that the rules of the Manx High Court did not authorize service out of the jurisdiction upon him, that no cause of action arose within the jurisdiction of that court and that he had never been domiciled in the Isle of Man. The defendant appeared by counsel in support of the motion to set aside service. The Manx court, after hearing argument on both sides, dismissed the motion. The defendant then took no further part in the proceedings. In *Henry v. Geopresco International Ltd.* the court noted that in *Harris v. Taylor* the defendant had gone much further than merely protesting against the jurisdiction: 'It is plain that he was also inviting the Isle of Man High Court not to exercise the discretionary jurisdiction which it undoubtedly possessed under its own local law to allow the order for service out of the jurisdiction to stand—a submission which by implication accepted that there was jurisdiction in that court which it was entitled to exercise if it thought fit to do so.'<sup>9</sup>

As has already been indicated, the Court of Appeal left open the question as to whether appearance solely to protest the jurisdiction constitutes submission. It explicitly stated that this question was not determined in *Harris v. Taylor*: 'We do not therefore, consider that adherence in the present appeal to what this court decided in *Harris v. Taylor* compels us also to hold that an appearance *solely* to protest against the jurisdiction of a foreign court is a voluntary submission to that court.'<sup>10</sup> At the same time the court admitted that 'the dividing line between what is and what is not

<sup>1</sup> (1856) 5 H.L. Cas. 811.

<sup>3</sup> [1975] 3 W.L.R. 620, 637.

<sup>5</sup> [1951] Ch. 842.

<sup>7</sup> Dicey and Morris, *The Conflict of Laws* (9th ed., 1973), p. 996.

<sup>8</sup> Cheshire, *Private International Law*.

<sup>2</sup> [1975] 3 W.L.R. 620, 640.

<sup>4</sup> [1915] 2 K.B. 580.

<sup>6</sup> [1968] 2 Lloyd's Rep. 259.

<sup>9</sup> [1975] 3 W.L.R. 620, 638. <sup>10</sup> Ibid.

a voluntary submission and what is and what is not an appearance solely to protest against the jurisdiction is narrow and may often be difficult to draw satisfactorily'.<sup>1</sup>

A rule that any appearance constitutes voluntary submission would of course dispose of these demarcation difficulties. But if it is conceded that the fact of appearance should not always be regarded in this way, one becomes involved in a search for a line which is logically faint or non-existent. Whenever a party appears it is in order to make some point, and this implies acceptance of the court's right to decide that point. The policies underlying the rule that submission grounds jurisdiction would seem to suggest that any appearance should raise a presumption of submission. This presumption should be rebuttable, if at all, only when it is clear that the defendant's conduct was intended to be no more than, and was in fact no more than, a complete denial of the court's right to adjudicate upon any aspect of the case. Even if this concession to the defendant is justifiable on grounds of policy if not of logic, it should be withheld if the defendant knew that by appearing in this way he would be deemed by the foreign court to be submitting more generally to its jurisdiction and yet still chose to appear.

A different, although related, point: in *Henry v. Geopresco International Ltd.* the Court of Appeal propounded a rule to the effect that 'English courts will not enforce the judgment of a foreign court against a defendant who, although he does not reside within the jurisdiction of that court, has assets within that jurisdiction and appears before that court solely to preserve those assets which have been seized by that court'.<sup>2</sup> This is a matter upon which earlier authority is far from decisive. The Court's expression of an opinion would appear to be by way of *obiter dictum*, and it is respectfully submitted that, involving as it does an intermingling of questions of intention and of motive, this question ought not to be regarded as finally resolved in these somewhat over-simplified terms.

In considering the significance of appearance to protest the jurisdiction, or appearance to protect property already seized, it must always be borne in mind that when a defendant goes to the trouble and expense of appearing, he does not do so because he likes it; he does so because he feels on balance that it is likely to be to his advantage. If in the event his assessment proves right, he will reap that advantage. Appearance involves the defendant in the taking of a calculated risk: the courts should be wary of making the plaintiff underwrite that risk.

### *A foreign judgment as a defence*

*Case No. 8.* The central question for determination by the House of Lords in *Black-Clawson Ltd. v. Papierwerke A.G.*<sup>3</sup> was as to the proper construction to be placed upon Section 8 (1) of the Foreign Judgments (Reciprocal Enforcement) Act, 1933. The relevant portion of the sub-section runs as follows: '... a judgment to which Part I of this Act applies or would have applied if a sum of money had been payable thereunder, ... shall be recognized in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings.' A German company had been sued by the appellants in Germany in respect of dishonoured bills of exchange. The action there was dismissed as being time barred without any inquiry into the merits. The German period of limitation was three years, the corresponding period under English law being six years. The appellants then sought

<sup>1</sup> [1975] 3 W.L.R. 620, 639.

<sup>2</sup> [1975] 3 W.L.R. 620, 637.

<sup>3</sup> [1975] 2 W.L.R. 513.



to bring proceedings in England. The House of Lords (Lord Diplock dissenting), reversing a strong and unanimous Court of Appeal,<sup>1</sup> held that Section 8 (1) did not entitle the respondents to rely on the German judgment in order to prevent them from doing so.

Lord Reid took the view that the Act did not deal with judgments that could not be enforced and that accordingly it did not apply to a judgment, such as that under consideration, which a defendant was seeking to use simply as a protection against a claim.

Lord Dilhorne, Lord Wilberforce and Lord Simon of Glaisdale more narrowly relied upon the old decision of *Harris v. Quine*.<sup>2</sup> There it had been held in 1869 that dismissal of an action in the Isle of Man because of the expiry of a short period of limitation, which did not destroy the plaintiff's right but merely made it unenforceable, was not a bar to subsequent proceedings in England on the same cause of action. Their Lordships held that this common law rule had not been abrogated by Section 8 (1). Lord Wilberforce reserved his position upon the wider question as to whether Section 8 (1) applies to defendant's judgments at all. Lord Simon and Lord Dilhorne were unable to subscribe to the view that it is limited to plaintiff's judgments. Lord Reid, for his part, did not doubt the correctness of *Harris v. Quine* and stated that, if (contrary to his view) Section 8 (1) were applicable to defendant's judgments, he would 'perhaps with difficulty' agree that the appellants should still succeed.<sup>3</sup>

All the Law Lords (including the dissentient Lord Diplock) seem to accept the correctness of the doctrine of *Harris v. Quine* as part of the common law. Lord Diplock's dissent was on the question as to whether or not this position had been altered by Section 8 (1). All three members of the Court of Appeal had held that it had, and Lord Diplock agreed with them. The majority of the Law Lords held that it had not.

In large part their Lordships judgments are concerned with the techniques and proprieties of statutory interpretation. *Black-Clawson Ltd. v. Papierwerke A.G.* may well become a leading case on that subject. This present note is concerned only with some of the apparent implications of the decision for the conflict of laws. The most important of these seem to be that the seal of the House of Lords' approval had been placed upon the doctrine of *Harris v. Quine*, and that that doctrine has not been modified by Section 8 (1) of Foreign Judgments (Reciprocal Enforcement) Act, 1933.

*Harris v. Quine* itself was decided more than a century ago, and reference to it in subsequent case law has been remarkably meagre. It is a decision which hitherto has, in some sense, stood somewhat alone. Moreover, it is important to appreciate the relative narrowness of the point which it decided. This was perhaps most succinctly put by Blackburn and Lush JJ. It is also implicit in the judgment of Cockburn C.J.; and Hayes J., the other member of the Court, concurred. Blackburn J. said: '... all that the Manx court decided was, that in the courts of the Isle of Man the plaintiffs could not recover. If the plaintiffs could have shown, as was attempted in *Huber v. Steiner*, 2 Bing. N.C. 202, that the law of the Isle of Man extinguished the right as well as the remedy, and this had been the issue determined by the Manx court, this would have been a different matter.'<sup>4</sup> Lush J. put the same point: 'Had the Manx statute of limitations ... extinguished the right as well as the remedy, there would have been good ground for defence in this court.'<sup>5</sup>

<sup>1</sup> [1974] Q.B. 660, Lord Denning M.R., Megaw and Scarman, L.JJ.

<sup>2</sup> (1869) L.R. 4 Q.B. 653.

<sup>3</sup> [1975] 2 W.L.R. 513, 522.

<sup>4</sup> (1869) L.R. 4 Q.B. 653, 658.

<sup>5</sup> *Ibid.*, 658.

There is no suggestion that the *ratio* of *Harris v. Quine* was extended in the *Black-Clawson* case. It would seem clear, therefore, that there, had the German court held that the plaintiff's right was extinguished and not merely that it had become unenforceable, the doctrine of *Harris v. Quine* would not have been applicable. Moreover, this would also have been the case if the German court had applied a rule of its own law having that effect, notwithstanding that by English conflicts criteria the proper law of the bills was English law. A foreign judgment cannot be impeached on the ground that the foreign court seemingly made a mistake of law, even if that mistake was one of choice of law.

The rule in *Harris v. Quine* constitutes a limited exception to the principle of conclusiveness of foreign judgments: one of its limits is defined in terms of a distinction between laws which extinguish rights and those which merely extinguish remedies. This distinction is, of course, well known to English private international law in the area of choice of law: an English court will characterize the former type of law as substantive but the latter as merely procedural. Lord Wilberforce in the *Black-Clawson*<sup>1</sup> case saw a clear connection between this choice of law characterization and the rule in *Harris v. Quine*. The latter he regarded as 'a logical and inevitable consequence' of the former and as being 'merely an application of a principle too firmly established to be now put in question'.<sup>2</sup>

It is submitted with respect, however, that the justification for the rule that a statute of limitation barring only the remedy is always to be classified as procedural is not by any means clear. Why, for example, should an action upon a foreign contract which is statute-barred by its proper law be maintainable in England? Conversely, why should an English party be forced to bring his action for breach of contract in the *forum* of the proper law simply because the limitation period there is longer? To classify a matter as being procedural and thus as being within the exclusive control of the *lex fori* often involves a risk of frustrating the purposes of the conflict of laws. This is usually only justified if impelling considerations of the *forum's* convenience require it. So far as limitation of actions is concerned, there could come a point at which facts have become so 'stale' that such considerations would operate, but this scarcely justifies a crude rule which takes account of small differences in the length of limitation periods. In any event the convenience of the *forum* would only require the application of its own bar, not the rejection of foreign bars.

The rule has been heavily criticized. Dr. Cheshire concedes that 'English law is unfortunately committed to the view that statutes of limitation, if they merely specify a certain time after which rights cannot be enforced by action, affect procedure, not substance', but concludes, 'This is another example when English law, through its failure to interpret a foreign rule in its context has gone astray'.<sup>3</sup> Although the classification has survived in the American Restatement,<sup>4</sup> it finds no place in most European systems.<sup>5</sup> The truth would seem to be that the dogma that limitation rules barring remedies *must* be characterized as procedural, although undoubtedly well established in England, would not stand up to scrutiny from a policy point of view. It is a matter for regret that justification for the rule in *Harris v. Quine* has been sought in this dogma. It is true that in *Harris v. Quine* itself Cockburn C.J. saw a close relationship between the characterization rule and the recognition rule; but it is also interesting, although

<sup>1</sup> [1975] 2 W.L.R. 513, 534-5.

<sup>2</sup> *Ibid.*, 535.

<sup>3</sup> Cheshire, *Private International Law* (9th ed., 1974), p. 687.

<sup>4</sup> American Law Institute, *Restatement of Law Second: Conflict of Laws*, § 142.

<sup>5</sup> See, Cheshire, *op. cit.* (above, n. 3), p. 687 footnote 5.



now perhaps only historically so, that the learned Chief Justice said of the characterization rule, 'If the matter were *res integra* and I had to form an opinion unfettered by authority, I should be much inclined to hold, when, by the law of the place of contract, an action on contract must be brought within a limited time, that contract ought to be interpreted to mean, I will pay on a given day, or within such time as the law of the place can force me to pay.'<sup>1</sup>

Amongst the facts enumerated by Lord Wilberforce as 'necessary for our decision' was: '1. The present action is brought upon two bills of exchange drawn by the appellants and accepted by a predecessor in business of the respondents—it is not disputed that the respondents have succeeded to any liability on these bills. The proper law of these bills is English law. The German proceedings were brought by the appellants against the respondents on these same bills after dishonour.' It is not altogether clear from the context whether his Lordship regarded the circumstance that the proper law of the bills was English as *per se* relevant to the decision. If it is so regarded, a new restriction upon the scope of *Harris v. Quine* is being introduced: that rule does not extend to cases in which the *lex causae* is the law of the country in which the foreign court sat. A German court's refusal of a remedy for breach of a German duty might be conclusive, whereas its refusal of a remedy for breach of a non-German (e.g. English) duty would not. Behind the acceptance of such a notion could lurk the notion that even statutes which bar only the remedy ought, after all, properly to be regarded as the concern of the *lex causae*. This would be a variance with established English dogma, which dogma was later accepted by Lord Wilberforce as being 'too firmly established to be now put in question'.<sup>2</sup>

It is submitted with respect that justification for *Harris v. Quine* could more happily be found in some words of Cockburn C.J., which were in fact cited by Lord Wilberforce,<sup>3</sup> to the effect that 'there is no plea going to the merits, according to the view which we are bound to take of the Manx statute of limitations, and *the issue which the Manx court decided in favour of the defendant is not the same issue as is raised in the present action*'.<sup>4</sup> The maxims '*Interest reipublicae ut sit finis litium*' and '*Nemo debet bis vexare pro eadem causa*' have traditionally been given commendable free rein in common law attitudes towards the judgments of foreign courts.<sup>5</sup> This has manifested itself in a reluctance to detract from the principle of conclusiveness. In an era of increasing internationalization the trend at the general level should surely be to reduce even further discrimination between the effects of foreign and domestic judgments. It is, however, legitimate to withhold efficacy if it is clear that the foreign court never even purported to determine the issues raised in the instant English proceedings. One may well share Lord Diplock's view that the phrase 'on the merits' is 'elusive as a term of art';<sup>6</sup> but there must come a point at which the issues determined in the foreign proceedings are so far remote from those raised in the subsequent English proceedings that the foreign judgment must be disregarded. One such case may be that in which all that the foreign court did was to hold that because of the elapse of time it would decline to investigate questions of fact or law. It is almost as if the foreign court had declined jurisdiction. This, it is submitted, is the most plausible justification for the anomaly which *Harris v. Quine* represents and which *Black-Clawson Ltd. v. Papierwerke A.G.* has perpetuated.

P. B. CARTER

<sup>1</sup> (1869) L.R. 4 Q.B. 653, 565.    <sup>2</sup> [1975] 2 W.L.R. 513, 535.    <sup>3</sup> (1869) L.R. 4 Q.B. 653, 657.

<sup>5</sup> [1975] 2 W.L.R. 513, 534-5; also cited by Lord Simon of Glaisdale at p. 545. Italics supplied.

<sup>4</sup> (1869) L.R. 4 Q.B. 653.

<sup>6</sup> [1975] 2 W.L.R. 513, 539.



# DECISIONS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS DURING 1973–1974\*

## A. DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

### *Competence of the Court to interpret its judgments—‘just satisfaction’ under Article 50*

*Case No. 1. Ringeisen case* (Interpretation of the judgment of 22 June 1972).<sup>1</sup> This was the Court's third judgment in the *Ringeisen* case. In the first,<sup>2</sup> it found that the applicant had been detained pending trial contrary to Article 5 (3) of the Convention. In the second,<sup>3</sup> it awarded him 20,000 German marks in ‘just satisfaction’ under Article 50. The Court was now asked to interpret its second judgment.

The request arose out of the steps taken by Austria to pay the 20,000 German marks awarded to the applicant. A number of the applicant's creditors had laid claim to the money. In the opinion of the Austrian Government, the Court had not ruled on the question whether or not it was free from attachment by creditors. The question therefore fell to be determined by Austrian law, but this was unclear also. In this situation, the Austrian Government decided to exercise its right under Austrian law as a debtor to pay the money into court for distribution in accordance with law. It paid the money into court in Austrian schillings as permitted by law. The applicant objected and sent a letter to the Commission for transmission to the Court asking the latter to make it clear that Austria was obliged to pay him the money directly in German marks in the Federal Republic free from attachment by creditors. Since an applicant may not request an interpretative judgment by the Court,<sup>4</sup> the Commission made such a request and put to the Court the following two questions:

First, what was the intended effect of the order for payment of compensation in D.M., particularly in respect of the actual currency and place of payment?

And secondly, whether the term ‘compensation’ is to be understood as payment of a sum free of any lawful claims made against it under Austrian law, or subject to such claims?

A preliminary question was whether the Court is competent to interpret its own judgments. It has such a power under Rule 53 of Rules of Court<sup>5</sup> but there is no mention of one in the Convention itself. It was submitted by Austria that there could be no power of interpretation unless one were expressly given by the Convention. The

\* © D. J. Harris, 1976.

<sup>1</sup> European Court of Human Rights (cited in these notes as *E.C.H.R.*), Judgment of 23 June 1973. French text authentic. The Court consisted of the following Chamber of Judges: Sir Humphrey Waldock (President), Cassin, Holmbäck, Verdross, Rodenbourg, Zekia and Favre (Judges). The Chamber was composed as far as possible of the judges who had been members of the Chamber which had given the judgment to be interpreted: Rule 53 (4), Rules of Court, European Court of Human Rights. For the composition of that Chamber, see this *Year Book*, 46 (1972–3), p. 470 n. 3.

<sup>2</sup> *E.C.H.R.*, Judgment of 16 July 1971.

<sup>3</sup> *E.C.H.R.*, Judgment of 22 June 1972.

<sup>4</sup> See the following note.

<sup>5</sup> Rule 53 (1) reads: ‘A Party or the Commission may request the interpretation of a judgment within a period of three years following the delivery of that judgment.’

Court rejected this submission. It had an inherent jurisdiction as a court to interpret its own judgments and, in any case, Rule 53 had been brought to the attention of the contracting parties in 1959 when it was adopted and had not been the subject of any objection. Austria, moreover, had contemplated requesting an interpretative judgment itself in the *Neumeister case*.<sup>1</sup> Both Austria and the Commission took the view in the pleadings in the case that any power of interpretation that the Court had was limited to the interpretation of the *dispositif* of a judgment. The Court did not comment upon this point; both of the questions put to it met any such requirement.

In answer to the first question put to it, the Court held, by six votes to one, that its judgment meant that the compensation was to be paid to the applicant in German marks in the Federal Republic of Germany. It had decided this because the applicant was resident in the Federal Republic and because his health and financial state called for swift payment.<sup>2</sup> Judge Verdross dissented. In his view, the compensation had been expressed in terms of German marks for the sake of convenience in view of the applicant's place of residence. This had been done without imposing a legal obligation as to the method of payment and without prejudicing such rules as might exist in the law of the defendant state concerning creditors' rights requiring or allowing their payment in a different currency and in a different place.

As to the second question, the Court held, by five votes to two, that it had meant the compensation to be paid to the applicant 'personally and free from attachment'.<sup>3</sup> In its second judgment the Court had said:

At the hearings before the Court the question was argued as to where the sum awarded to Ringeisen would go: could it be paid to him directly or could it be claimed by the trustee, on recommencement of the bankruptcy, for the purpose of making an additional payment to the creditors.

The Court considers that it can leave this point to the discretion of the Austrian authorities. The Court notes in this regard that under the terms of Section 2 of the Act of 18 August 1918 [on compensation for detention on remand] . . . 'no attachment or seizure may be made against a right to compensation except to secure payment of maintenance as provided for by law' and that a similar provision appears in Section 4 of the Federal Act of 8 July 1969 on compensation for detention and conviction by the criminal courts. It would seem to be a matter of course that the same exemption from seizure must be allowed in the case of compensation due under a decision of the Court to a person whose detention on remand has been prolonged beyond the reasonable time laid down in Article 5 (3) of the Convention.<sup>4</sup>

In elucidation of this passage, the Court stated in the present judgment:

In referring to 'the discretion of the Austrian authorities' ('la sagesse des autorités autrichiennes'), the Court did not qualify its intention by a limitation. If mention was made of Section 2 of the Austrian Act of 18 August 1918 and of Section 4 of the Act of 8 July 1969, it was to indicate that it was all the more justifiable to order a direct payment to the beneficiary in that the principle whereby debts of this kind are free from attachment applied also in Austrian law in analogous cases. What was entrusted to the discretion of the Austrian authorities is the practical execution of the measures ordered by the Court in conformity with this principle.<sup>5</sup>

<sup>1</sup> See *E.C.H.R.*, *Stögmüller case*, Series B, p. 192.

<sup>2</sup> Judge Zekia referred only to the place of residence of the applicant in his separate opinion in the present judgment.

<sup>3</sup> *E.C.H.R.*, Judgment of 23 June 1973, p. 9.

<sup>4</sup> *Ibid.*, p. 10.

<sup>5</sup> *Ibid.*, p. 9.

Judges Verdross and Zekia dissented. Judge Verdross distinguished between the question of the compensation due to the applicant from Austria and the rights of his creditors against him:

The first concerns a relationship between the applicant and the Republic, the second a relationship between the applicant and his creditors. To enable the Court to restrict the rights of the applicant's creditors, it would therefore be necessary to have a special provision in the Convention. In the absence of such a provision the Court has no power to order that the satisfaction afforded to the applicant shall be free from attachment by his creditors.<sup>1</sup>

Judge Zekia took a different approach. He impliedly accepted that the Court could under Article 50 have imposed an obligation upon Austria to pay the applicant his compensation free of attachment. He considered, however, that although this was obviously what the Court had wanted to happen, it had not gone so far in its second judgment as actually to require it. He referred to the passage from the second judgment quoted above and explained by the Court in support of his view.

The Court's judgment, which has been complied with by Austria,<sup>2</sup> throws further light on the power of the Court to afford 'just satisfaction' under Article 50. Not only is the Court competent to require that a certain amount of monetary compensation be paid, it can also insist that it be paid in a particular currency and in a particular State and that it be paid free from attachment by creditors. The law of a contracting party must, moreover, allow the Government to comply with any such requirement. None of this was disputed by Austria in the *Ringeisen* case. Austria acted as it did because of its reading of an equivocal passage in the Court's second judgment.

The judgment also confirms that the Court has the power to interpret its judgments. It has been generally thought that an international tribunal has no power to interpret its judgments in the absence of express authorization.<sup>3</sup> If, however, the purpose of the interpretation is solely to clarify what has already been decided it would seem to be in the interest of the good administration of justice for there to be a rule the other way—at least in the case of a permanent tribunal such as the Court, which has no difficulty in reconstituting itself, even though it may not be possible on occasions for its composition to be exactly the same as it was when the judgment to be interpreted was delivered.

Finally, the position of the individual *vis-à-vis* the Court in respect of the interpretation of judgments is shown to be essentially the same as it is at other stages of a case before the Court. He has no right to initiate proceedings and no right of participation.<sup>4</sup> The Commission, however, acting in the interest of the proper application of the Convention may, in its discretion, seize the Court of a request for the interpretation of a judgment at the applicant's request, and may, again in its discretion, present the views of the applicant to the Court so far as it thinks this appropriate.

<sup>1</sup> *Ibid.*, p. 10.

<sup>2</sup> *Yearbook of the European Convention on Human Rights*, 16 (1973), p. 70.

<sup>3</sup> Most commentators (see, e.g., Simpson and Fox, *International Arbitration* (1959), p. 245) take the view in the text, citing the *Jaworzina Frontier* case, *P.C.I.J.*, Series B, No. 8, p. 38 (1923). See, however, the International Law Commission's Model Draft on Arbitral Procedure, Article 35, *Yearbook of the International Law Commission*, 1958-II, p. 15.

<sup>4</sup> Thus in the present proceedings the decision to dispense with an oral hearing was taken after consultation with the Commission and the Austrian Government but not with the applicant: *loc. cit.* (above, p. 385 n. 1), p. 5.



*Relationship between Article 50 and Article 5 (5)—waiver of a claim under Article 50—length of pre-trial detention in criminal proceedings (Article 5 (3))—whether ‘just satisfaction’ required on the facts*

*Case No. 2. Neumeister case* (question of the application of Article 50 of the Convention).<sup>1</sup> In its first judgment in this case<sup>2</sup> the Court ruled that Austria had violated Article 5 (3) of the Convention by continuing to detain the applicant pending trial when his detention had ceased to be justifiable. In July 1968, shortly after the Court's judgment, the applicant was found guilty of aggravated fraud by the Vienna Regional Criminal Court and sentenced to five years' imprisonment. The whole of the time he had spent in detention pending trial—two years, four months, and twenty days—was to be deducted from this sentence. In December 1970, the applicant sought compensation from the Austrian Government in respect of damage he claimed to have suffered as a result of the violation of Article 5 (3), but his claim was rejected. Thereupon, on 17 September 1971, the applicant referred his claim to the Commission, citing the Court's judgment and Articles 5 (5) and 50. The Commission passed the claim on to the Court which made arrangements for proceedings under Article 50.

Just before the oral hearing scheduled for 23 May 1972, the Court agreed to an adjournment at the request of the Austrian Government because it was conducting negotiations with the applicant with a view to the settlement of his claim. On 14 February 1973 the applicant was granted a pardon in respect of the part of his sentence remaining to be served, i.e. two years, seven months and ten days. According to the Austrian Government, the pardon was granted on the condition that the applicant would waive his claim against it under Article 50. According to the applicant, this was not so; he had agreed to waive his claim, but only on the further condition that the Austrian Government would cease to pursue claims under Austrian law against the applicant arising out of his conviction, which it had refused to do. It was in these circumstances that the Court decided to continue with the proceedings it had initiated under Article 50 and heard oral arguments from the Austrian Government and the Commission in January 1974.

In the present judgment, the Court first rejected unanimously an argument by the Austrian Government to the effect that Article 50 was inapplicable. Austria relied primarily<sup>3</sup> upon its interpretation of the relationship between Article 5 (5)<sup>4</sup> and 50. Whereas, in its opinion, Article 50 applied to violations of the Convention generally, Article 5 (5) was a *lex specialis* containing a rule concerning violations of Article 5 in particular. The question of reparation for a violation of Article 5 was therefore not, as in the case of violations of other Articles, to be dealt with by the continuance of proceedings before the Court, but by a new application under Article 25 alleging a violation of Article 5 (5). This, moreover, was what the applicant had in mind when he referred to Article 5 (5) in his letter to the Commission.

As far as the applicant's intention was concerned, the Court took the view that the

<sup>1</sup> *E.C.H.R.*, Judgment of 7 May 1974. French text authentic. The Court consisted of the following Chamber of Judges: Balladore Pallieri (President); Holmbäck, Verdross, Mosler, Zekia, Cremona, and O'Donoghue (Judges). The Chamber was composed as far as possible of the judges who had been members of the Chamber which had given the first judgment in the case.

<sup>2</sup> *E.C.H.R.*, Judgment of 27 June 1968.

<sup>3</sup> Other submissions made by it concerning the application of Article 50 had, as the Court pointed out, *loc. cit.* (above, n. 1), at p. 14, been rejected by it in the *Ringeisen* case, *E.C.H.R.*, Judgment of 22 June 1972, pp. 7–8.

<sup>4</sup> Article 5 (5) reads: 'Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.'

Austrian Government's interpretation of it was 'not beyond discussion', since his letter to the Commission had referred not only to Article 5 (5) but also to Article 50 and to the Court's judgment of 1968. In any case, the intention of the applicant in this regard could not be decisive. The Court also rejected the Austrian Government's argument as to the relation of Articles 5 (5) and 50:

Article 5 (5) and Article 50 are placed on different levels, although both Articles deal with questions of compensation under the Convention.

The first lays down a rule of substance: placed among the 'normative' provisions of Section I of the Convention, it guarantees an individual a right, the observance of which is obligatory in the first instance for the authorities of the Contracting States, as the use in the English text of the adjective 'enforceable' confirms.

Article 50, for its part, lays down a rule of competence: placed in Section IV of the Convention, it authorises the Court expressly to afford subject to certain conditions, just satisfaction to the 'injured party'. One of these conditions is the existence of a national decision or measure 'in conflict with the obligations arising from the . . . Convention', and there is nothing to show that a breach of one of the first four paragraphs of Article 5 is not to be taken into account in this regard. While paragraph 5 of Article 5 carefully specifies that 'everyone who has been the victim' of such a breach 'shall have an enforceable right to compensation', it in no way follows therefrom that the Court cannot apply Article 50 when it has found that there has been a breach, for example, of paragraph 3; what does follow, and no more, is that in the exercise of the wide competence conferred upon it by Article 50, the Court must take into consideration among other factors the rule of substance contained in paragraph 5 of Article 5.<sup>1</sup>

Moreover, the Austrian Government's interpretation would result in a delay in the determination of the question of compensation 'which would scarcely be in keeping with the idea of the effective protection of human rights'.<sup>2</sup> In the Court's view, the applicant's letter of 16 September 1971 was correctly seen by the Commission as initiating the final phase in proceedings in the case under Article 50.

The Court next considered and rejected a submission by the Austrian Government that the applicant had waived his claim to compensation under Article 50 by his conduct in connection with the granting of his pardon. The Court was not satisfied on the facts that the applicant had made any waiver. The waiver of a right under the Convention was to be shown by 'unequivocal statements or documents'.<sup>3</sup> Although there was some evidence to support the Austrian Government's contention, there was a sufficient element of doubt to prevent the Court from deciding that a waiver had been made. In any case, here too the intention of the applicant was not decisive. A statement by the applicant to the defendant government that he 'waived', or did not wish to pursue further, the question of 'just satisfaction' in view of reparation already made by the Government, would be material in any assessment by the Court of the need for any action under Article 50. It could not, however, be binding upon the Court, which had to make up its own mind whether the Convention was complied with and whether, in particular, there was a need to supplement whatever reparation might have been made by further 'just satisfaction' under Article 50.

The Court then considered the applicant's claims on their merits. He claimed compensation of between 3 and 7 million schillings for material and moral damage. The material damage consisted of the loss suffered by the applicant's company by reason of

<sup>1</sup> Loc. cit. (above, p. 388 n. 1), p. 13. The Court had earlier impliedly rejected the same argument as to the relationship between Article 5 (5) and Article 50 in the *Ringeisen* case, *E.C.H.R.*, Judgment of 22 June 1972.

<sup>2</sup> *E.C.H.R.*, Judgment of 7 May 1974, p. 14.

<sup>3</sup> *Ibid.*, p. 16.



his absence and of the salary he had forfeited as managing director. The moral damage was the 'injustice suffered' at being illegally detained. The applicant also claimed compensation of 250,000 to 260,000 schillings for the lawyer's costs he had incurred in establishing the illegality of his detention in the Austrian courts and at Strasbourg. The Court held unanimously that the first two of these claims were not well founded but that Austria should pay the applicant 30,000 schillings<sup>1</sup> in respect of the third.

In considering these claims the Court first determined the length of time during which the applicant had been detained contrary to Article 5 (3), a determination which it had not found necessary to make in its first judgment. It found that he had been justifiably detained for approximately the first eight of the twenty-six months of his detention, but that thereafter his detention had been a violation of the Convention.

As to the claim for compensation for material damage, the Court agreed that some loss had been suffered by the applicant. It considered, however, that this was balanced by the pardon he had been granted and the fact that the period of pre-trial detention had been counted as a part of his sentence:

In effect, the time the applicant had spent in detention on remand was reckoned as part of his sentence and, more especially, he was granted remission of the remainder of his sentence, i.e., two years, seven months and ten days. He would doubtless have had prospects, if he had been imprisoned after conviction, of being released on probation for a third of the term of imprisonment, but even on this assumption it is established that he avoided deprivation of liberty for eleven months and ten days at the very least. Moreover, he was saved the adverse consequences which further imprisonment would inevitably have caused him in his business activities. In short, the act of grace of 14th February 1973 was of considerable benefit to him. The few conditions which accompany that act are in no way onerous; they are defined limitatively in the Act which applies to such cases. While remission of sentence, like the reckoning of detention as part of a sentence, does not constitute real *restitutio in integrum* (Ringeisen judgment of 22nd June 1972, Series A, no. 15, p. 8, para. 21, 2), it comes as close to it as is possible in the nature of things.<sup>2</sup>

In addition, the attitude of the applicant to the pardon—his acceptance of it as the best form of reparation in the circumstances and his statement at one point that he would be prepared to waive his claim to compensation if one were granted—confirmed 'the just character of the measures taken by Austria in favour of the applicant'.<sup>3</sup> In these circumstances, the Court did not consider it 'necessary', in the sense of Article 50, to award the applicant 'just satisfaction' for the material damage he had suffered.

The Court reached the same conclusion in respect of the moral damage suffered by the applicant. Although he had suffered moral damage by virtue of being detained for some eighteen months or so longer than was justifiable and could in principle claim compensation under Article 50 in respect of that damage, the Court was of the opinion that on the facts of the case the pardon was sufficient to compensate the applicant for the moral, as well as the material, damage he had suffered.

The Court finally examined and allowed the applicant's claim in respect of legal costs to the extent of 30,000 schillings. It considered that such a claim was permissible under Article 50:

The Court considers it proper, in this particular case, to distinguish between damage caused by a violation of the Convention and the necessary costs which the applicant has had to incur in order to try to prevent such violation, to have it established by the Commission and later by the Court and to obtain, after judgment in his favour, just

<sup>1</sup> Between £700 and £800.

<sup>2</sup> *E.C.H.R.*, Judgment of 7 May 1974, p. 18.

<sup>3</sup> *Ibid.*, p. 19.



satisfaction either from the competent national authorities, or if appropriate, from the Court.<sup>1</sup>

In this case the Court felt that although the pardon had made up for the material and moral damage suffered by the applicant, it had not compensated for the expenses necessarily incurred by him in vindicating his rights.

The judgment in this case, which has been complied with by the defendant State,<sup>2</sup> follows the precedents set by the Court in the *Vagrancy*<sup>3</sup> and *Ringeisen*<sup>4</sup> cases concerning the application of Article 50. As in those cases, the violation of the Convention for which 'just satisfaction' was sought was one in respect of which *restitutio in integrum* was impossible.<sup>5</sup> In such cases, as well as in cases where the constitutional law of the defendant State allows no more than 'partial reparation', Article 50 applies and a claim under it need not be preceded by recourse to all such local remedies as may be available; it is sufficient, as on the facts of the present case, for the applicant to claim compensation from the Government concerned and to be refused.<sup>6</sup> What was new in this present judgment was the recognition by the Court that in the case of pre-trial detention contrary to Article 5 (3) a pardon by the defendant State could in appropriate circumstances constitute reparation so as to make 'just satisfaction' under Article 50 unnecessary. The judgment is also the first in which the Court has allowed an applicant to recover under Article 50 in respect of the legal costs he has incurred, both domestically and in respect of his Strasbourg application.<sup>7</sup> Neither of these rulings is controversial. The second presumably applies to the legal costs of establishing a violation of any provision of the Convention.

*Right of access to the civil courts (Article 6 (1))—right to respect for correspondence (Article 8)—application of Article 50*

*Case No. 3. Golder case.*<sup>8</sup> The applicant, a United Kingdom national, was serving a prison sentence at Parkhurst Prison in October 1969 when a demonstration by prisoners occurred in which L., a prison guard, was assaulted. L. made a statement in which he identified the applicant as one of his assailants. The applicant was segregated with other suspects from the main body of prisoners, questioned, and told that he might be prosecuted for assault. L. then made a second statement conceding that he might have been mistaken in his identification of the applicant as an assailant, and another prison officer gave evidence to the effect that the applicant had taken no part at all in the demonstration. Thereupon, charges which it had been proposed to bring against the applicant were dropped and the entries in his prison record concerning the matter were marked 'charges not proceeded with'. The applicant believed that L.'s first statement

<sup>1</sup> Ibid., p. 20.

<sup>2</sup> See C.E. Doc. H (75) 3, p. 13.

<sup>3</sup> E.C.H.R., Judgment of 18 June 1971.

<sup>4</sup> Loc. cit. (above, p. 385 n. 3).

<sup>5</sup> As in the *Ringeisen* case, loc. cit. (above, p. 385 n. 3), the Court took the view that in a case of detention contrary to Article 5 (3), the deduction from sentence of the period spent in pre-trial detention could not constitute *restitutio in integrum*.

<sup>6</sup> There has been no case yet in which *restitutio in integrum* was possible so that the question whether Article 50 applies in such a case remains to be determined.

<sup>7</sup> The question was commented upon by the Court in the special context of Article 5 (4) in the *Vagrancy* cases, loc. cit. (above, n. 3), p. 8, and by Judge Zekia in his dissenting judgment in the same case.

<sup>8</sup> A. 4451/70. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 14 (1971), p. 416. Report of the Commission adopted on 5 July 1973. E.C.H.R., Judgment of 21 February 1975. French text authentic. The case was heard by the plenary Court: Rule 48, Rules of Court.

had been left on his record and that this was why he had later been refused parole. For this reason, on 20 March 1970 he sought permission from the Home Secretary to communicate with a solicitor with a view to bringing proceedings in libel against L. Permission was refused under Rule 34 (8) of the Prison Rules<sup>1</sup> which reads:

A prisoner shall not be entitled under this Rule to communicate with any person in connection with any legal or other business, or with any person other than a relative or friend, except with the leave of the Secretary of State.

The Commission expressed the unanimous opinion in its report that Article 6 (1) guaranteed a right of access to the courts and that the refusal of the Home Secretary to allow the applicant to communicate with a solicitor was a violation of that right. It also expressed the opinion, by 7 votes to 2, that Article 8 applied to the facts of the case and, by 8 votes to 1, that it had been violated by the same facts as constituted a violation of Article 6 (1).

The case was referred to the Court by the United Kingdom. Agreeing with the Commission, the Court held, by 9 votes to 3, that there had been a breach of Article 6 (1), and, unanimously, that Article 8 had been infringed as well. It also held, unanimously, that these findings in favour of the applicant amounted in themselves to adequate satisfaction so that no award under Article 50 was called for.

The applicant's claim under Article 6 was that by refusing him permission to communicate with a solicitor the United Kingdom had infringed the right of access to the courts guaranteed, it was submitted, by that Article. In ruling on this claim, the Court first determined that it did not matter that what was being denied *in law* was the right to communicate with a solicitor, not the right to begin legal proceedings. It was sufficient that the refusal to allow the applicant to communicate with a solicitor was a hindrance *in fact* to the commencement of legal proceedings. It was sufficient, moreover, even though it was only a hindrance and not a complete bar; it did not matter that the applicant could have brought proceedings later upon his release within the period of limitation or that, one way or another, he might have managed to have had a writ issued even though unable to communicate personally with a solicitor in accordance with the Prison Rules. Judge Sir Gerald Fitzmaurice was the only judge to disagree with the Court in this respect. In his opinion, access to the courts had not been denied. Although he was prepared to accept that a denial of access could be said to have occurred for the purposes of Article 6 where a person had been denied access 'permanently and finally',<sup>2</sup> in fact that was not the case here because the applicant could have brought proceedings when released from prison.

On the question whether Article 6 guaranteed the right of access to the courts, the Court concluded that it did. Even though the Article contained no express mention of the right, its protection could be inferred from the wording of the English and French texts of Article 6, especially the French. This conclusion could be supported also by the concept of the 'rule of law', which was referred to in the Preamble to the Convention as a part of the 'common heritage' of the signatory states and acceptance of which was required of member States of the Council of Europe in accordance with the Council's Statute.<sup>3</sup> In the words of the Court, 'in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts'.<sup>4</sup> The Court also pointed out that if Article 6, and hence the Convention as a whole, did not

<sup>1</sup> S.I. 1964, No. 388. See also Rule 33, *ibid*.

<sup>2</sup> *E.C.H.R.*, Judgment of 21 February 1975, p. 41.

<sup>3</sup> Article 3. <sup>4</sup> *E.C.H.R.*, Judgment of 21 February 1975, p. 17.

protect the right of access to the courts, it would be possible for a contracting party to 'do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government'.<sup>1</sup> To interpret the Convention so as to allow such a possibility would be to ignore both the general principle of law whereby a civil claim must be capable of being submitted to a judge and the principle of international law which prohibits the denial of justice. These gave rise to, or were, rules of international law which, in accordance with the Vienna Convention on the Law of Treaties, were to be taken into account in interpreting Article 6. Another factor was the law-making character of the Convention. This meant, as the Court had stated in the *Wemhoff* case, that:

it is . . . necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.<sup>2</sup>

The Court considered and rejected the argument that there might be certain implied limitations upon the right of access to the courts applicable to the facts of this case. It accepted that the right of access in Article 6 was not an absolute one and mentioned, without commenting upon their consistency with Article 6, regulations limiting the right of access of minors and persons of unsound mind that are commonly found in municipal law. As far as restrictions concerning prisoners were concerned, the Court declined to pronounce in the abstract upon such restrictions generally or upon those in the United Kingdom rules in particular. It limited itself instead to the facts before it:

In petitioning the Home Secretary for leave to consult a solicitor with a view to suing Laird for libel, Golder was seeking to exculpate himself of the charge made against him by that prison officer on 25th October 1969 and which had entailed for him unpleasant consequences, some of which still subsisted by 20th March 1970. . . . Furthermore, the contemplated legal proceedings would have concerned an incident which was connected with prison life and had occurred while the applicant was imprisoned. Finally, those proceedings would have been directed against a member of the prison staff who had made the charge in the course of his duties and who was subject to the Home Secretary's authority.

In these circumstances, Golder could justifiably wish to consult a solicitor with a view to instituting legal proceedings. It was not for the Home Secretary himself to appraise the prospects of the action contemplated; it was for an independent and impartial court to rule on any claim that might be brought. In declining to accord the leave which had been requested, the Home Secretary failed to respect, in the person of Golder, the right to go before a court as guaranteed by Article 6 (1).<sup>3</sup>

Three judges—Judges Verdross, Zekia and Sir Gerald Fitzmaurice—disagreed with the Court on the question of the right of access. They did so for various reasons, the most important of which were the following. All three disagreed with the conclusion drawn by the Court from the wording of Article 6. For Judges Zekia and Sir Gerald Fitzmaurice it was clear from the text that Article 6 controlled only the conduct of court proceedings and not the right to bring them. For Judge Verdross, the exceptional character of the Court's jurisdiction, allowing the Court to rule upon matters normally within the domestic jurisdiction of a State, was such that the Court was incorrect to infer a right of access which it could enforce against a State just from a series of 'clues' scattered about the text; the Court's jurisdiction was to be 'interpreted strictly'.<sup>4</sup>

<sup>1</sup> Ibid.

<sup>2</sup> *Wemhoff* case, *E.C.H.R.*, Judgment of 28 June 1968.

<sup>3</sup> *E.C.H.R.*, Judgment of 21 February 1975, pp. 19-20.

<sup>4</sup> Ibid., p. 24.



All three judges also emphasized an aspect of the context of Article 6. Article 1 of the Convention requires States to secure to persons within their jurisdiction the rights and freedoms 'defined' in the Convention. Could a right be said to be 'defined' when it was not even mentioned? Judges Zekia and Sir Gerald Fitzmaurice stressed a second contextual point. Article 17 states that nothing in the Convention shall be taken as allowing a State to impose limitations upon the rights and freedoms guaranteed in the Convention to any greater extent than is provided for in the Convention. In their view, this meant *expressly* provided for, so that any right of access to the courts would have to be an unqualified one, which could not have been intended. The same two judges also pointed out that in other comparable international instruments<sup>1</sup> the right of access had been expressly included where it was thought appropriate to protect it.

Judge Sir Gerald Fitzmaurice also criticized the Court's general approach to the interpretation of the Convention. For him the important point was not that this was a law-making treaty which should be interpreted in case of doubt in accordance with its object and purpose of protecting human rights. It was instead the fact that the Convention had 'broken entirely new ground internationally, making heavy inroads on some of the most cherished preserves of governments in the sphere of their domestic jurisdiction or *domaine réservé*'.<sup>2</sup> The various revolutionary features of the Convention were such as

could justify even a somewhat restrictive interpretation of the Convention but, without going as far as that, they must be said, unquestionably, not only to justify, but positively to demand, a cautious and conservative interpretation. . . .<sup>3</sup>

The claim under Article 8 was in respect of freedom of correspondence. In the opinion of the Court, Article 8 applied to the case even though no letter had been written. It was sufficient that permission to communicate with a solicitor—which, initially at least, would normally involve a letter, and hence 'a piece of correspondence within the meaning of paragraph 1 of Article 8'—had been refused; this was the most far-reaching form of 'interference' with correspondence that there could be.<sup>4</sup> The Court rejected the contention that there could be other limitations upon the rights protected in Article 8 in addition to those expressly listed in paragraph 2. In particular, the British Government's submission that control over the correspondence of a person imprisoned in accordance with Article 5 (1) (a) of the Convention could be justified quite apart from Article 8 (2) was met by the Court with the argument that the wording of that provision ('there shall be no interference . . . except such as . . .') ruled out such a possibility. The Court also rejected the Government's alternative submission that the case fell within Article 8 (2) in so far as it permits limitations 'for the prevention of disorder or crime'. Even allowing the British Government 'a margin of appreciation', the Court did not consider that it was 'necessary in a democratic society' on *any* ground permitted by Article 8 (2) for the applicant to be refused permission to consult with a solicitor in his case.

The case, which was the first to reach the Court from the United Kingdom, is of great importance because of the Court's ruling on the right of access to the courts. No judge denied that the right is a fundamental one and ought to be protected. The only

<sup>1</sup> e.g. Article 8, Universal Declaration of Human Rights, Res. 217A (III), *General Assembly Official Records*, 3rd Session, Part I, Resolutions, p. 71, and Article 7, European Convention on Establishment, *United Kingdom Treaty Series*, No. 1 (1971) (Cmd. 4573).

<sup>2</sup> *E.C.H.R.*, Judgment of 21 February 1975, p. 52; cf. the argument of Judge Verdross referred to above.

<sup>3</sup> *Ibid.*, p. 53.

<sup>4</sup> *Ibid.*, p. 20.

question was whether the Convention actually protected it. The answer which the Court gave turned upon its approach to the interpretation of the Convention. By a large majority, the Court emphasized the object and purpose of the Convention because of its character as a law-making treaty. It had adopted the same emphasis earlier in the *Wemhoff* case to give meaning to an obscure provision (Article 5 (3)). In the present case, it was more a matter of adding to the substance of a provision that had a perfectly meaningful existence without the right of access being read into it. None the less, the Court's teleological approach would seem a permissible one in the circumstances. There was some textual evidence to support the inclusion of the right and it is one that is well recognized in the law of the contracting parties. The judgment does, however, reveal an inherent weakness in such an approach. The Court found itself unable to set the contours of the right which it inferred. These will have to be marked as the occasion allows in future cases.

As far as Article 8 is concerned, the ruling by the Court that there are no limitations upon the rights guaranteed other than those listed in Article 8 (2) is consistent with its earlier judgment in the *Vagrancy* cases.<sup>1</sup> There, however, the Court invoked a 'margin of appreciation' doctrine in the application of Article 8 (2) which seemed as if it might have much the same effect. The ruling on the facts in the *Golder* case clearly shows that it does not. Whereas it could be used in the *Vagrancy* cases to justify a limited power of censorship which did not include the prohibition, or even inspection, of letters by a detained vagrant to his lawyer, it did not justify in the *Golder* case a refusal to allow a convicted prisoner any correspondence with a lawyer, especially when the correspondence involved the exercise of his right of access to the courts guaranteed under Article 6. Whether the 'margin of appreciation' doctrine would justify under Article 8 (2) a limitation upon the number of letters that a prisoner may write<sup>2</sup> remains to be seen.

The case was the first in which the Court has applied Rule 47 *bis* of the Rules of Court in respect of Article 50 of the Convention. Before this Rule was adopted in 1972, the Court had acted on the basis that when a violation of the Convention was found to exist a claim under Article 50 would be considered in separate proceedings after the judgment on the merits of the case had been delivered and after the defendant State had been given an opportunity to make reparation.<sup>3</sup> Rule 47 *bis* speeds proceedings by allowing the Court to hear argument and to rule upon the question of the application of Article 50 when the issue of liability itself is being determined if the application of Article 50 is a matter that is then 'ready for decision'.

This requirement was considered to have been met in the *Golder* case and the Court ruled that no further 'just satisfaction' was required. Rule 47 *bis* establishes a useful procedure where it is thought that a declaratory judgment in favour of the applicant is sufficient reparation on the facts so that no action needs to be taken by the defendant State or where the defendant State has already taken adequate remedial action. Whether these are the only situations in which the Court will act under Rule 47 *bis* is not clear from its wording. Presumably in a case where further reparation is required, the defendant State will be allowed an opportunity to act before the essentially secondary power to afford 'just satisfaction' that the Court has under Article 50 comes into play.

<sup>1</sup> *Vagrancy* cases (Merits), *E.C.H.R.*, Judgment of 18 June 1971.

<sup>2</sup> For such a limitation in the United Kingdom, see Rule 34 (2), Prison Rules, loc. cit. (above, p. 392 n. 1). See further Jacobs, *The European Convention on Human Rights* (1975), pp. 138-41.

<sup>3</sup> See, e.g., *Ringeisen* case (Question of the application of Article 50 of the Convention), *E.C.H.R.*, Judgment of 22 June 1972.



## B. DECISIONS OF THE COMMITTEE OF MINISTERS

*Right to respect for private and family life (Article 8)—right to education (Article 2, First Protocol)—freedom from discrimination (Article 14)—the role of the Committee of Ministers under Article 32*

*Case No. 1. Les Fourons case.*<sup>1</sup> This case really belongs to the group of cases that were ruled upon by the Court in the *Belgian Linguistics* case<sup>2</sup> in 1968. It was treated separately from the others because there seemed a chance of a friendly settlement. When it proved impossible to achieve one, the Commission adopted its report. The case was not referred to the Court.

The case concerned mainly the language of instruction used in six Belgian communes known as Les Fourons. Under the Belgian law of 30 July 1963, instruction in schools in Les Fourons was in principle to be given in the language of the region, which was Dutch. The law recognized, however, that although the communes were in a region of the country which generally was Dutch-speaking, the communes themselves constituted a mixed area in which a large proportion of the population spoke French. This recognition took the form of accepting that French language schools should be provided or subsidized in the communes if certain conditions were met. These were that the child's mother or usual language was French; that the head of his family was resident in the commune; that sixteen such heads of families in the commune requested instruction in French language schools; and that there was no other French language school within four kilometres.

The present application was brought by the *Association régionale pour la Défense des Libertés*, acting on behalf of 165 heads of families in Les Fourons. It was claimed that the 1963 law violated Article 8 of the Convention (in particular the right to respect for private and family life) and Article 2 of the 1st Protocol of the Convention when each was taken in conjunction with Article 14 of the Convention. In its report, the Commission applied the principles and rules laid down by the Court in the *Belgian Linguistics* case. It found, by 11 votes to 1, that Belgium had not violated Articles 8 and 14 of the Convention. It found, unanimously, that she had violated Article 2 of the 1st Protocol and Article 14 of the Convention.

The Commission explained its findings concerning Article 2 of the 1st Protocol and Article 14 of the Convention as follows. The provision or subsidizing of Dutch language schools in Les Fourons was not subject to any specific conditions and all children were admitted to them without any language or residential qualifications. In contrast, the provision or subsidizing of French language schools was subject to the conditions mentioned earlier. In accordance with those conditions also, French language schools in the area were open only to children whose mother or usual language was French and whose parents lived in the area. In the opinion of the Commission, these were discriminations in respect of the right of education which were not justifiable in terms of the general interest in what was a mixed language area. They were therefore contrary to Article 2 of the 1st Protocol and Article 14 of the Convention.

The Commission's report was adopted in 1971. The final decision in the case was taken by the Committee of Ministers in 1974. In the meantime changes had been made

<sup>1</sup> A.2209/64. Decision as to admissibility: *Collection of Decisions of the European Commission of Human Rights*, 15 (1964), p. 24. Report of the Commission adopted 30 March 1971. Resolution of the Committee of Ministers of 30 April 1974: Resolution D H (74) 1.

<sup>2</sup> E.C.H.R., Judgment of 23 July 1968.



in Belgian law and practice along the lines of the Court's judgment in the *Belgian Linguistics* case. One result of these was, as the Committee of Ministers found, that

The French-speaking schools in the six townships of the Fourons area which did not receive subsidies can now do so in the school year 1973/74 while at the same time the creation of new subsidised French-speaking schools has been made possible and achieved.<sup>1</sup>

In view of this, the Committee of Ministers resolved the case as follows:

Voting in accordance with Article 32 (1) of the Convention, [the Committee]

- (a) takes note of the opinion expressed by the Commission in accordance with Article 31 (1) of the Convention;
- (b) takes note of the constitutional, legislative and administrative provisions governing in Belgium the matter under consideration and in particular the Royal Orders of 10 May and 19 October 1973;
- (c) decides in consequence that no further action is called for in this case.<sup>2</sup>

The case is of particular interest as one in which the defendant State took steps to comply with the Convention in a politically sensitive context. The Committee of Ministers' decision in the case is surprising in that it contains no finding on the question whether Belgium had violated the Convention.<sup>3</sup> The power that the Committee has under Article 32 clearly requires it to make such a finding even where action has been taken by the defendant State to bring its law and practice into line with the Convention. Such action goes to the question whether measures should be required of it by the Committee, not to the question whether a violation of the Convention has occurred.

### C. DECISIONS OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS

*Right to education (Article 2, 1st Protocol)—freedom from discrimination (Article 14)—reservations to the Convention (Article 64)—informal settlement*

*Case No. 1. Karnell and Hardt v. Sweden.*<sup>4</sup> The applicants were Swedish nationals who were parents of children of school age and members of the Evangelical-Lutheran Church of Sweden. They complained of the refusal by the Swedish Government to allow parents of children belonging to the Church to withdraw their children from religious education classes in Swedish schools. Provision was made in Swedish law for the granting of exemption in such cases, but no exemption was granted in respect of the Evangelical-Lutheran Church. The applicants claimed that the refusal was a violation of the right of parents in respect of the education of their children guaranteed by Article 2 of the 1st Protocol to the Convention. Relying upon a reservation to Article 2 that it had made at the time of ratifying the 1st Protocol, the Swedish Government denied this.

The Commission admitted the application under Article 2 in accordance with the applicants' claim. It also admitted it *ex officio* under Article 14 of the Convention for consideration of the fact that exemptions had been granted in respect of other Christian and non-Christian churches. As to the effect of the Swedish reservation, the Commission noted that although its normal practice was to rule upon the scope of a reservation

<sup>1</sup> Report of the Commission, p. 118.

<sup>2</sup> Ibid.

<sup>3</sup> Cf. Jacobs, *The European Convention on Human Rights* (1975), p. 268.

<sup>4</sup> A.4733/71. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 14 (1971), p. 676. Report of the Commission adopted 28 May 1973. See also the partial decision as to admissibility, *ibid.*, p. 664.

at the admissibility stage, it would leave the question until later in this case because of the complexity of the issues involved.

After the hearing of the merits of the case had been postponed at the request of the parties, the Commission was informed in January 1973 that a settlement had been reached, with the result that the applicants wished to withdraw their application. According to the terms of the agreement, the Swedish Government agreed to the applicants' request for exemption for children who were members of the Church on condition that arrangements were made for the children to have religious instruction comparable to that which they would have received in school. The Commission agreed that proceedings in the case should be terminated.

The case is an example of one in which a friendly settlement was achieved informally by the parties themselves. An interesting question is whether the applicants would have achieved their objective without first applying to Strasbourg.

*Right to trial within a reasonable time (Article 6 (1))—friendly settlement*

*Case No. 2. Mellin v. Federal Republic of Germany.*<sup>1</sup> The applicant, a West German national, was convicted of fraudulent conversion by the Mainz Regional Court in 1971 and sentenced to three years' imprisonment and to a fine of 1000 DM. In this application he complained that he had not been tried within a reasonable time as required by Article 6. The investigation into his case began and a warrant was issued for his arrest on 16 February 1961. The applicant learnt of these facts from his lawyer the following day in Switzerland where he had fled on 14 February 1961. Upon his return to the Federal Republic, the applicant was detained on remand from 30 September 1961 to 25 October 1961. He was not rearrested pending trial after this. The first indictment was preferred against him on 15 July 1963, ten months after the investigation into the case had been completed. The applicant's request for a judicial preliminary inquiry was allowed on appeal on 8 October 1963 and the inquiry began on 23 February 1964. On 8 April 1964, the investigating judge asked an economic expert for a report on the case; this was filed two years later on 31 May 1966. In 1966, a new investigating judge was appointed and the preliminary inquiry was completed on 27 March 1968. After steps by the applicant to obtain further investigation of his case had failed, his trial began on 17 February 1971 and was completed two days later. The applicant's appeals were rejected and he began to serve his three-year sentence on 4 August 1972. The length of time that the case had lasted was taken into account when his sentence was determined.

The Commission admitted the application for consideration on its merits on 16 July 1973. In its report of 12 December 1973, the Commission stated that a friendly settlement in the sense of Article 28 (b) had been reached. By this, the Federal Republic of West Germany agreed to grant a conditional remission of the remainder of the applicant's sentence subject to a four-year probationary period. In addition, pending the coming into effect of the remission granted by the Federal Government, the Ministry of Justice of Rhineland-Palatinate agreed to grant a provisional suspension of the applicant's sentence with effect immediately, i.e. from 13 September 1973. As a result, the applicant was released after serving only 13 months of his sentence.<sup>2</sup> In return, the

<sup>1</sup> A.5765/72. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 16 (1973), p. 300. Report of the Commission adopted 12 December 1973.

<sup>2</sup> What amount of remission, if any, he could have expected in the normal course of events is not clear.

applicant agreed not to pursue further any claim against the Federal Republic of Germany in his case at any level.

The Commission accepted that the settlement was consistent with the Convention. In doing so, it stated that 'the issue under Article 6 can be investigated in other cases concerning the Federal Republic of Germany at present pending before the Commission which raise similar problems'.<sup>1</sup> It also took note of certain changes in West German criminal law and procedure designed to speed criminal proceedings. These included the abolition of the judicial preliminary inquiry and the suspension of proceedings when twice the prescription period has elapsed.

The case is of interest because of the remarkable length of time that the criminal proceedings in the case took.<sup>2</sup> Although the applicant was responsible for some of the delay, it was stated by the West German Federal Court of Justice when the case came before it on appeal that 'the unusual length of the proceedings must, to a great extent, be attributed to the slowness with which the organs responsible for their conduct had performed their functions'.<sup>3</sup> That Court would seem to have accepted that the delay constituted a violation of Article 6,<sup>4</sup> but in view of the friendly settlement the Commission was not called upon to pronounce upon the question.

The Commission did, however, consider in its decision as to admissibility another question which has given rise to a lot of difficulty in the application of Article 6, viz. the point at which Article 6 begins to apply. Following the approach it had adopted earlier in the *Neumeister* case,<sup>5</sup> the Commission stated that the point at which an applicant could be considered as first being subject to a 'criminal charge' in the sense of Article 6 was 'that at which the situation of the person concerned has been substantially affected as a result of a suspicion against him'.<sup>6</sup> Applying this test to the facts before it, the Commission decided that Article 6 began to apply, as the applicant claimed, on 17 February 1961 when he became aware that the investigation of his case had begun. It did not begin to apply later, as the West German Government claimed, on 30 September 1961, when the applicant was arrested.

It is interesting (though not important on the facts of the case) that the Commission did not choose 16 February 1961 when the investigation started and when a warrant was issued for the applicant's arrest. It would appear from this that a person is not 'substantially affected' unless he knows that an investigation into his case has begun. This approach can be explained on the basis that what Article 6 is intended to prevent, when it requires that a person be tried within a reasonable time, is in part that he be not placed under the mental pressure of having criminal proceedings hanging over him for longer than is reasonable. In contrast, knowledge that the investigation into an offence has commenced is not a factor that the Court has emphasized. In the three cases<sup>7</sup> that have come before it in which the question under consideration has arisen, the

<sup>1</sup> Report of the Commission, p. 7.

<sup>2</sup> Cf. the *Soltikow* case, Report of the Commission adopted 3 February 1970. See this *Year Book*, 46 (1972-3), p. 485.

<sup>3</sup> *Yearbook of the European Convention on Human Rights*, 16 (1973), p. 308.

<sup>4</sup> *Ibid.*, p. 310. It rejected, however, the applicant's contention that criminal proceedings should be terminated if Article 6 is violated; in the Federal Court of Justice's opinion the case should be completed and the delay in proceedings taken into account, as happened in the applicant's case, in determining the sentence.

<sup>5</sup> See *Neumeister* case, *E.C.H.R.*, Series B, pp. 81, 211.

<sup>6</sup> *Yearbook of the European Convention on Human Rights*, 16 (1973), p. 326.

<sup>7</sup> *Wemhoff* case, *E.C.H.R.*, Judgment of 27 June 1968; *Neumeister* case, *E.C.H.R.*, Judgment of 27 June 1968; *Ringeisen* case, *E.C.H.R.*, Judgment of 16 July 1971.



Court found that Article 6 began to apply when the investigation into the case by a judge or a public prosecutor had begun. In the present case, therefore, it is reasonable to suppose that the Court would have chosen 16 February 1971. In the *Neumeister* case also the Court chose a different date from that chosen by the Commission in accordance with its 'substantial effect' test. Although the Commission in the present case considered that its decision was compatible with the jurisprudence of the Court, it would seem that there is not an exact equation between the approaches adopted by the two bodies. The Commission's approach is the more flexible;<sup>1</sup> that of the Court, the more certain. It is noticeable that the decisions by the Court and the Commission to the effect that Article 6 can begin to apply at the investigatory stage of criminal proceedings have all concerned civil law systems. It would be surprising if Article 6 were to apply in a common law system when the police were investigating a case against an accused and before he is arrested or a summons is issued against him.

*Freedom from inhuman treatment (Article 3)—right to take proceedings to test the legality of arrest or detention (Article 5 (4))—right to family life (Article 8)—friendly settlement*

*Case No. 3. Amekrane case.*<sup>2</sup> Mohamed Amekrane, a Moroccan national and a Lieutenant-Colonel in the Moroccan Air Force, was a party to a plot to kill King Hassan of Morocco and to overthrow his government. When the plot failed, Amekrane fled, on 16 August 1972, from Morocco to Gibraltar where he requested political asylum. The request was refused and he was declared a prohibited immigrant. The Moroccan Government asked for his return and on 17 August 1972 Amekrane was handed over to its representatives at Gibraltar airport whence he was flown back to Morocco on a Moroccan Air Force plane. On his return, Amekrane was interrogated, tried and sentenced to death by military tribunal. He was executed by firing squad on 15 January 1973.

An application was made to Strasbourg on 16 December 1972 in the name of Amekrane, his wife and his two children in which violations of Articles 3, 5 (4) and 8 of the Convention were alleged. It was claimed that the first applicant had been subjected to 'inhuman treatment' contrary to Article 3 primarily because he was returned to Morocco when it was known that he would be prosecuted there for a political offence and sentenced to death if convicted. Article 5 (4) had been infringed, it was claimed, because the first applicant had only been told that he was being returned to Morocco about an hour before he was flown back to Morocco; in these circumstances the right guaranteed by Article 5 (4) to take legal proceedings to challenge the legality of his arrest by the British authorities was not complied with in fact, although there was a remedy available to him under Gibraltarian law. The claim under Article 8 was that all of the applicants had been denied their right to family life by the return of the first applicant to Morocco when his wife and family had left that country.

The application was given precedence by the Commission<sup>3</sup> and declared admissible on 11 October 1973 on the ground that it raised issues sufficiently complicated to

<sup>1</sup> An example of the flexibility inherent in the Commission's approach is *X v. Federal Republic of Germany*, A.4649/80, *Collection of Decisions of the European Commission of Human Rights*, 46 (1974), p. 1. In that case the Commission found that Article 6 began to run when the police, who were investigating allegations of fraud against the applicant, published a picture of him in a newspaper warning the public against him—it was then that he began to be 'substantially affected' by the suspicion against him.

<sup>2</sup> A.5961/72. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 16 (1973), p. 356. Report of the Commission adopted 19 July 1974.

<sup>3</sup> Rule 38 (1), Rules of Procedure of the Commission.

require an examination on the merits. The Commission considered this to be true of the allegations made by the applicants and also of issues that it thought arose under Article 5 (1), (2), (3) concerning the rights of detained persons. In July 1974 a 'friendly settlement' in the sense of Article 28 was reached with the assistance of the Commission by which the United Kingdom agreed to pay the applicants £37,500 in full and final settlement of their claims. The payment was made *ex gratia* and was understood by the United Kingdom as not implying any admission by it that the Convention had been violated.

The case is a remarkable one both because it is the first in which an application against the United Kingdom from an overseas territory has been declared admissible and because of the amount of compensation paid by the United Kingdom. £37,000 is by far the largest sum that a State has agreed to pay as part of a 'friendly settlement'. But then, as *The Times* said, the whole affair was 'a sad episode from which the government of the time emerged with little credit and some justified opprobrium'.<sup>1</sup> There was no extradition treaty between Morocco and the United Kingdom and the case would appear to have been one of extradition in the guise of the application of the immigration laws.<sup>2</sup> The haste with which the matter had been dealt with had, moreover, effectively prevented Amekrane from questioning in the courts in Gibraltar the legality of his return for trial for a political offence punishable with death.<sup>2</sup>

The issues under the Convention raised in the case were left unresolved. A particularly interesting question is whether the Commission would have found that the return of the first applicant for trial for a capital political offence amounted to 'inhuman treatment' contrary to Article 3. It has on several occasions stated that the return of a fugitive from justice in such circumstances could violate the Convention<sup>3</sup> but has not yet applied this rule to the facts of any case.

*Freedom from forced or compulsory labour (Article 4)—freedom from discrimination (Article 14)—right to property (Article 1, 1st Protocol)—friendly settlement*

*Case No. 4. Gussenbauer case.*<sup>4</sup> The applicant, an Austrian national, practised law in Vienna. He complained in two separate applications that his appointment as defence counsel in criminal proceedings under the Austrian legal aid system violated the Convention. In accordance with that system, a lawyer is obliged to act if appointed, on pain of disciplinary sanctions, unless there is good reason to excuse him. He is not entitled to remuneration for his services nor to expenses other than travelling expenses. Instead the Austrian Government pays an annual sum to the area Bar Associations to help provide pensions for lawyers and their dependants. In 1971, when the present case was brought, lawyers had no legal right to a pension thus funded and the annual sum contributed by the State was only a small percentage of the amount payable in accordance with scale fees.

The applicant alleged violations of Article 4 (freedom from forced or compulsory labour); of that Article when read in conjunction with Article 14 (freedom from discrimination); and of Article 1 of the 1st Protocol (right to property). He claimed that

<sup>1</sup> *The Times*, 14 August 1974, editorial.

<sup>2</sup> Cf. the case of Dr. Soblen in 1963, as to which see O'Higgins, *Modern Law Review*, 27 (1964), p. 521, and Thornberry, *International and Comparative Law Quarterly*, 12 (1963), p. 414.

<sup>3</sup> See, e.g., A.1462/62, *Yearbook of the European Convention on Human Rights*, 5 (1962), p. 256.

<sup>4</sup> A.4897/71 and A.5219/71. Decisions as to admissibility: *Yearbook of the European Convention on Human Rights*, 15 (1972), pp. 448, 558. Report of the Commission (on both applications) adopted 8 October 1974.



it was 'forced or compulsory labour' contrary to Article 4 to require a lawyer to defend an accused without remuneration. It was also a violation of Article 4 as read with Article 14 to treat advocates in this way when other professions and other branches of the legal profession (notaries, court interpreters, etc.) were not so treated. Article 1 of the 1st Protocol was violated, it was alleged, because the applicant had been deprived of the remuneration which he could expect for professional work.

The Commission admitted the applications for consideration on their merits on the ground that they raised 'issues of a complex nature' under the Articles mentioned and could not be rejected as manifestly ill founded.

In 1974 a 'friendly settlement' of the case in the sense of Article 28 was reached to the satisfaction of the Commission. The applicant agreed to withdraw his claims in the light of the revision of the legal aid system introduced by the Austrian Government in 1973 and later modified in accordance with certain suggestions made by the applicant and in view of an undertaking by the Austrian Government to pay the applicant's expenses (30,000 schillings)<sup>1</sup> in proceedings before the Commission. Under the revised legal aid system lawyers are still obliged to act without remuneration but the amount of money paid to the Bar Associations for pension fund purposes is in accordance with scale fees. Lawyers also have statutory pension rights and the Austrian Government has undertaken to take steps to ensure that legal aid work would be distributed equally among lawyers.

It is difficult to know to what extent the alterations in the Austrian legal aid system adopted in 1973 can be attributed to the present case. Certainly, the improvements upon the 1973 scheme accepted by the Government in the course of negotiations in the case can. The case raised the question of the meaning of 'forced or compulsory labour' in Article 4 and, had proceedings continued, would have given the Commission an opportunity to reconsider its restrictive reading of that concept in the controversial *Iversen* case<sup>2</sup> in which an application concerning the compulsory employment of dentists in certain regions of Norway was rejected at the admissibility stage. The present case differed from the *Iversen* case in that no remuneration was payable to the applicant and the compulsory service was not for a certain term. Presumably, the obligations of lawyers under the legal aid system applicable in 1971 would not have been regarded as a part of 'normal civic obligations' (Article 4 (3) (d)).

The question whether it is 'forced or compulsory labour' to require a lawyer to participate in a legal aid system arose again in 1974 in a case from the Federal Republic of Germany. There the Commission rejected the claim as inadmissible because the applicant lawyer had known of the obligation to participate when he entered the legal profession. Because of this, there was no 'forced or compulsory labour'.<sup>3</sup>

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<sup>1</sup> Between £700 and £800.

<sup>2</sup> A.1468/62, *Yearbook of the European Convention on Human Rights*, 6 (1963), p. 278. See Schermers, *Nederlands Tijdschrift voor International Recht*, 11 (1964), p. 366.

<sup>3</sup> A.4649/70, *Collection of Decisions of the European Commission of Human Rights*, 46 (1974), p. 1.



# DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES DURING 1973–1974\*

*Sources of law—whether Council is bound by its own decisions and regulations*

*Case No. 1. Commission of the European Communities v. Council of the European Communities.*<sup>1</sup> Article 65 (1) of the Staff Regulations of the European Communities provides:

The Council shall each year review the remuneration of the officials and other servants of the Communities. This review shall take place in September in the light of a joint report by the Commission based on a joint index prepared by the Statistical Office of the European Communities in agreement with the national statistical offices of the member States; the index shall reflect the situation as at 1 July in each of the countries of the Communities.

During this review the Council shall consider whether, as part of economic and social policy of the Communities, remuneration shall be adjusted. Particular account shall be taken of any increases in salaries in the public service and the needs of recruitment.

For many years the application of this provision gave rise to disagreements about the size of salary increases between the staff associations (usually supported by the Commission) and the Council.

In order to prevent such disagreements in the future, the Council adopted a new system for the implementation of Article 65 on 21 March 1972. The new system, which the Council said would remain in force for three years, provided that salaries should be reviewed every year 'in the light of' two indices; the first index was based on the rise during the previous year of salaries in the public service in the member States, and the second index was based on the rise during the previous year of total emoluments per head in the public service in the same States.

In September 1972 the Commission, finding that the two indices disclosed rises of 3.6 per cent and 3.9 per cent respectively, proposed a salary increase for Community officials of 3.75 per cent, representing the arithmetical mean of the two indices. The Council, however, adopted a regulation on 12 December 1972 providing for an increase of only 2.5 per cent. The Commission asked the Court to annul the regulation on the ground that it should have provided for an increase of at least 3.6 per cent.

The crucial question concerned the legal status of the system introduced on 21 March 1972. The Court held not only that the Council's resolution was a legal decision and not a mere statement of policy, but also that the Council was bound by that decision for the period of three years specified therein. On both these points the Court rejected the contrary opinion of Mr. Advocate-General Warner. The Court's judgment on the first point was based on narrow arguments of little general interest, but its judgment on the second point raises major problems of principle.

Why was the Council bound by its own decision? The Court's judgment made little attempt to answer this question, apart from emphasizing that the decision was intended to be binding on the Council. But that merely begs the question whether the Council *can* be bound by its own decision. It is significant that the Court's judgment was not

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<sup>1</sup> [1973] E.C.R. 575.

based on a general principle of law common to the laws of the member States; as the Advocate-General demonstrated, the laws of the member States lend little support to the views expressed by the Court.<sup>1</sup>

A possible basis for the Court's judgment which was not mentioned by the Court can be found in the law of treaties. The Council's decision of 21 March 1972 was not a treaty, but the ultimate source of the Council's authority is the E.E.C. Treaty, so it is not unreasonable to look for relevant analogies in the law of treaties. According to Article 37 (2) of the Vienna Convention on the Law of Treaties, a right conferred by a treaty on a third State can be revoked by the parties to the treaty unless it is established that the right was intended not to be revocable without the consent of the third State. It is submitted that a similar rule should be applied to rights under international law conferred on individuals by treaties or by decisions of international organizations based on treaties. Certainly there is no justification for giving to an individual rights which are less revocable than those which a third State possesses; it would be absurd if a national of a third State had rights less revocable than those of the third State itself, and equally absurd if nationals of a party to a treaty had rights less revocable than those of nationals of a third State, since the general rule in international law is that a State has greater discretion in the treatment of its own nationals than in the treatment of the nationals of other States. It would therefore be going too far to say that the rights of individuals under international law can never be revoked by the States which originally conferred those rights on individuals. In normal circumstances the rights which individuals enjoy under the E.E.C. Treaty or E.E.C. regulations can be revoked by amendments to the Treaty or by new regulations; to hold otherwise would be to inject an unacceptable degree of rigidity into the law of the E.E.C.<sup>2</sup> But the analogy of Article 37 (2) of the Vienna Convention on the Law of Treaties suggests that such rights are irrevocable when the States concerned intended them to be irrevocable.<sup>3</sup> The Council's decision of 21 March 1972 stated that it would remain in force

<sup>1</sup> The Court's decision in *Cie. Continentale France v. Council*, [1975] 1 C.M.L.R. 578 implies that the Council is liable in tort if it enacts a regulation which conflicts with a prior undertaking given by the Council (such an undertaking need not be contained in a binding act of the Council; it can also take the form of a mere statement of future policy). According to Article 215 of the E.E.C. Treaty, the Community's tortious liability is supposed to be governed by the general principles common to the laws of the member States. But tortious liability raises issues which are different from those raised by the nullity of a regulation; as Mr. Advocate-General Trabucchi pointed out (*ibid.*, pp. 584-7), the Council can be liable in tort for enacting a regulation which conflicts with a prior undertaking given by the Council, even though the regulation itself is not invalid.

<sup>2</sup> Revocation of *some* rights would be a violation of human rights if compensation were not paid (see Article 1 of the First Protocol to the European Convention on Human Rights, and cf. *Nold v. Commission*, [1974] E.C.R. 491); but that does not apply to all rights, as the *Nold* case demonstrates. In any case, repeal of a regulation does not revoke the individual rights created by the regulation, unless the repealing act contains a 'valid provision to the contrary': *Variola* case, [1973] E.C.R. 981, 991 (but cf. the *Westzucker* case, *ibid.*, p. 723).

<sup>3</sup> It was for this reason that the author suggested in *New Zealand Universities Law Review*, 5 (1973), pp. 231, 235, that the League of Nations Covenant conferred rights on the inhabitants of Palestine which were irrevocable without their consent.

Rundstein, *Recueil des cours*, 23 (1928), pp. 331, 426-31, suggests that States which have given individuals a right under a treaty to bring claims before an international tribunal may make a new treaty revoking that right, unless the tribunal has already given a judgment in the individual's favour (on this last point, he is supported by Witenberg, *Journal de droit international*, 54 (1927), pp. 307, 309-10). Presumably the reason for this distinction is that it is easier to infer an intention on the part of the States concerned that rights under judgment debts should be irrevocable than it is to infer an intention that a mere right of action should be irrevocable; Rundstein



for three years; as the Court pointed out, there was a clear intention that it should be irrevocable during that period.

As regards the circumstances in which the Council was bound by its own acts, the Court had this to say:

... by its Decision of 21 March 1972, the Council, acting within the framework of the powers relating to the remunerations of the staff conferred on it by Article 65 of the Staff Regulations, assumed obligations which it has bound itself to observe for the period it has defined.

Taking account of the particular employer-staff relationship which forms the background to the implementation of Article 65 of the Staff Regulations, and the aspects of consultation which its application involved, the rule of protection of the confidence that the staff could have that the authorities would respect undertakings of this nature, implies that the Decision of 21 March 1972 binds the Council in its future action.

Whilst this rule is primarily applicable to individual decisions, the possibility cannot by any means be excluded that it should relate, when appropriate, to the exercise of more general powers.

Furthermore, the adjustment each year of remunerations provided for in Article 65 only constitutes an implementing measure of an administrative rather than a legislative nature, and is within the framework of the Council's application of that provision.

The Court thus recognized that the Council could be bound by its regulations and directives as well as by its decisions, although the Court considered that the 'act' of 21 March 1972 was simply a decision. The real problem is whether the principle laid down by the Court applies only to the employer-staff relationship, or whether it applies in other contexts as well. The language used by the Court might imply that the principle is confined to the employer-staff relationship,<sup>1</sup> but there is no logical or moral justification for giving Community officials greater rights than other persons. Regulations on other topics, affecting other persons, might contain undertakings that they would not be repealed during a certain period; why should such an undertaking not be binding on the Council, if the Council is bound by similar undertakings given to Community officials? The fact that the decision of 21 March 1972 was taken in the framework of a process of collective bargaining cannot make any difference, because the relationship between the Communities and their officials is not a contractual relationship;<sup>2</sup> the decision of 21 March 1972 was a decision, not a contract. Admittedly it

seems to regard the original intention of the States concerned as the paramount consideration, because he says that an express statement in the original treaty about the revocability or irrevocability of the rights in question must prevail over the rules which he enunciates (*loc. cit.*, pp. 426-7).

See also Akehurst, *The Law Governing Employment in International Organizations* (1967), pp. 201 (especially n. 3) and 254-5.

States may always create new rules of international law imposing duties on individuals: Akehurst, *op. cit.*, pp. 254-5 (although, applying the principle stated in the main text above, an exception would exist in the unlikely event of the individuals being able to prove that the States concerned had intended the individuals' pre-existing liberty to be irrevocable). A State may join with other States in imposing such duties on its nationals (*Ohlendorf case, Annual Digest*, 15 (1948), pp. 656, 659) or, it is submitted, on any individual for whom it could enact municipal legislation (*cf. this Year Book*, 46 (1972-3), pp. 152-69 and 179-212).

<sup>1</sup> The English text of the judgment is misleading when it talks about 'the rule of protection of the confidence that the *staff* could have that the authorities would respect undertakings of this nature'. 'Staff' is a mistranslation of 'Betroffenen', the word used in the original German, which means 'persons affected'. The Common Market Law Reports translate 'Betroffenen' as 'citizens', [1973] C.M.L.R. 639, 657, 662 (*cf. the official French version, which uses the word 'administrés'*).

<sup>2</sup> Akehurst, *The Law Governing Employment in International Organizations* (1967), chapter 3.



is important to protect 'the confidence that the staff could have that the authorities would respect undertakings of this nature', but it is at least equally important to protect the confidence aroused by similar undertakings given to other people.<sup>1</sup> If such a view seems to place excessive fetters on the Council's freedom of action, the solution is simple; the Council ought not to undertake not to repeal a regulation unless it is certain that it can abide by such an undertaking.

The Court then considered whether there had been a change of circumstances justifying the Council in departing from its prior undertaking, and found on the facts that there had not. The Court thus implied that a change of circumstances, had it been proved, would have justified a departure from the undertaking given in the decision of 21 March 1972; but it is not clear whether the Court was thinking in terms of a general rule about changes of circumstances, or whether it was relying on the fact that Article 65 (1) of the Staff Regulations (which the decision of 21 March 1972 was intended to implement, not to supersede) required the Council to take into account other factors in addition to those listed in the decision of 21 March 1972.

Finally, the Court turned to the interpretation of the provisions in the decision of 21 March 1972 which required the Council to review salaries 'in the light of' the two indices. The Council argued that this meant that the Council, while taking the two indices into account, was also entitled to take into account the other factors referred to in Article 65 (1), so that the Council was not obliged to raise salaries by the amounts indicated by the two indices. The Court rejected this argument; the two indices constituted upper and lower limits within which the Council enjoyed discretion,<sup>2</sup> but from which it was not allowed to depart. In raising salaries by an amount less than that indicated by the lower of the two indices, the regulation of 12 December 1972 had violated the decision of 21 March 1972.

*Restrictive practices—agreements notified to the Commission and agreements exempted from notification—provisional validity*

*Case No. 2. S. A. Brasserie de Haecht v. the spouses Wilkin-Janssen (No. 2).*<sup>3</sup> The plaintiff was a Belgian brewery company, and the defendants were retail dealers in beer and other drinks at Esneux, a small town in Belgium. In 1963 the plaintiff made a loan to the defendants, who promised, in a series of standard-form contracts, to buy all their beer and soft drinks from the plaintiff. In 1966 the plaintiff discovered that the defendants had been buying beer and soft drinks elsewhere, and began proceedings for breach of contract before the Liège Commercial Tribunal. The Court of Justice of

<sup>1</sup> Some support for this view may be found in dicta in *Westzucker G.m.b.H. v. Einfuhr- und Vorratsstelle für Zucker*, [1973] E.C.R. 723, 729-31.

<sup>2</sup> The extent of the Council's discretion was clarified in *Commission of the European Communities v. Council of the European Communities*, [1975] E.C.R. 795, 810, in which the Court said:

If in a permanent system of adjustment of salaries in which the measure of variation in national salaries is considered as resulting from the joint consideration of two indices, the Council systematically and without valid reason adopts the lower index, it would be disregarding an essential factor in the system to which it had intended to commit itself.

However, in the present case the Council has expressly stressed in its Decision of . . . 21 March 1972 that it was a question of a system of appraisal adopted on a trial basis for a period of three years, the validity of which would during the third year be the subject of a thorough review for the purpose of making the structural alterations which prove necessary.

In these circumstances its decision during the two periods in question [i.e. the first two years] to adopt the lower index cannot be regarded as being wrong . . .

<sup>3</sup> [1973] E.C.R. 77.

the European Communities gave a preliminary ruling in 1967 at the request of the Liège Commercial Tribunal: although the Court's ruling did not pronounce on the facts of the case, it implied that the contracts were contrary to Article 85 (1) of the E.E.C. Treaty.<sup>1</sup> In 1969 the plaintiff notified to the Commission a standard-form contract containing the same clauses as the contracts entered into in 1963. The plaintiff now claimed that the effect of this notification was to deprive municipal courts of the power to declare the contracts void for breach of Article 85. The Liège Commercial Tribunal asked the Court of Justice of the European Communities to give another preliminary ruling on three questions concerning the effects of notification.

The first question was as follows:

Must a procedure under Articles 2, 3 and 6 of Regulation No. 17 be considered to be initiated by the Commission from the moment when it acknowledges receipt of a request for a negative clearance or of notification for the purposes of obtaining exemption under Article 85 (3) of the E.E.C. Treaty?<sup>2</sup>

Before the Court of Justice of the European Communities the plaintiff argued that this question was irrelevant for the resolution of the dispute. The plaintiff interpreted the Court's judgment in the *Portelange* case<sup>3</sup> to mean that agreements notified to the Commission enjoyed provisional validity until the Commission took a decision granting or refusing exemption under Article 85 (3): until the Commission had taken such a decision, national courts were debarred from treating such agreements as void, not because Article 9 (3) of Regulation 17 deprived municipal courts of jurisdiction, but because the agreements enjoyed provisional validity. According to the plaintiff, it was therefore unnecessary for the Court to interpret Article 9 (3).

Apparently in response to these arguments of the plaintiff, the Court prefaced its reply to the three questions asked by the Liège Commercial Tribunal with some 'general considerations'.

From the earliest years of the E.E.C., interpreters of Article 85 (2) have been placed on the horns of a dilemma. On the one hand, Article 85 (2), which declares void all agreements prohibited by Article 85, is self-executing and is not subject to any transitional provisions. On the other hand, Article 85 (2) declares void agreements prohibited by Article 85 as a whole, and not agreements prohibited merely by Article 85 (1). Agreements prohibited by Article 85 (1) may in certain circumstances qualify for exemption under Article 85 (3), and it would be manifestly unjust to treat as void an agreement which might later be granted exemption by the Commission.<sup>4</sup> The tension or contradiction between the self-executing character of Article 85 (2) and the needs of legal certainty (*sécurité juridique*, *Rechtssicherheit*) has never been fully resolved by

<sup>1</sup> *Recueil de la jurisprudence de la Cour de justice des Communautés européennes* (hereinafter *Recueil de la jurisprudence*), 13 (1967), p. 525, and [1968] C.M.L.R. 26, noted in this *Year Book*, 42 (1967), p. 320.

<sup>2</sup> The Liège Commercial Tribunal was referring by implication to Article 9 (3) of Regulation 17, which provides: 'As long as the Commission has not initiated any procedure under Articles 2, 3 or 6 [of Regulation 17], the authorities of the member States shall remain competent to apply Article 85 (1) . . .' Article 2 authorizes the Commission to grant negative clearance; Article 3 authorizes it to order undertakings to cease infringements of Articles 85 and 86; Article 6 regulates the granting of exemptions by the Commission under Article 85 (3).

<sup>3</sup> *Recueil de la jurisprudence*, 15 (1969), p. 309, and [1974] 1 C.M.L.R. 397, noted in this *Year Book*, 44 (1970), p. 236. (The final paragraph of that case-note is no longer correct, in the light of the Court's judgment in the second *Brasserie de Haecht* case.)

<sup>4</sup> Note that the Commission has an exclusive and discretionary power to grant exemption under Article 85 (3); national courts have no power to grant exemption, and in most cases cannot predict accurately what the Commission's decision will be.



the Court. In earlier cases such as the *Portelange* case the Court leant in favour of the principle of legal certainty by holding that agreements notified to the Commission for the purposes of obtaining exemption under Article 85 (3) enjoyed provisional validity until the Commission took a decision granting or refusing exemption. In the present case the Court evidently felt that the emphasis on legal certainty had gone far enough, and that it was now necessary to emphasize the self-executing character of Article 85 (2). Although it did not expressly cite its previous judgments, it distinguished them in effect on the grounds that they concerned 'old' agreements, i.e. agreements which were in existence before Regulation 17 came into force.<sup>1</sup> A different rule applied to 'new' agreements, i.e. agreements made after Regulation 17 came into force. The Court expressed the matter thus:

In the case of old agreements, the general principle of contractual certainty requires, particularly when the agreement has been notified in accordance with the provisions of Regulation 17,<sup>2</sup> that the [municipal] court may only declare it to be automatically void after the Commission has taken a decision by virtue of that Regulation.

In the case of new agreements, as the Regulation assumes that so long as the Commission has not taken a decision the agreement can only be implemented at the parties' own risk, it follows that notifications in accordance with Article 4 (1) of Regulation No. 17 do not have suspensive effect.

In other words, notification does not confer provisional validity on 'new' agreements.

The Court acknowledged that 'the sometimes considerable delays by the Commission in exercising its powers' might make it difficult for a municipal court to apply Article 85 (2). But the Court added:

In such a case it devolves on the [municipal] court to judge, subject to the possible application of Article 177, whether there is cause to suspend proceedings in order to allow the parties to obtain the Commission's standpoint, unless it establishes either that the agreement does not have any perceptible effect on competition or trade between member States or that there is no doubt that the agreement is incompatible with Article 85.

This sentence is highly condensed. In some cases it will be fairly clear that an agreement is not contrary to Article 85 (1) because it has no perceptible effect on competition or on trade between member States; such an agreement is fully valid as far as Community law is concerned, although it may fall foul of some rule of municipal law. At the other extreme there will be agreements which are clearly contrary to Article 85 (1) and which have no chance<sup>3</sup> of obtaining exemption under Article 85 (3); in such cases a municipal court must hold the agreements to be void. In the intermediate category, where an agreement is prohibited by Article 85 (1) but may perhaps be entitled to exemption under Article 85 (3), a municipal judge has a choice; either he can give judgment at once (and presumably hold the agreement to be void,<sup>4</sup> since it has not yet obtained exemption under Article 85 (3)), or he can suspend proceedings until the

<sup>1</sup> On 13 March 1962 or 1 January 1973, depending on the geographical scope of the agreements; see this *Year Book*, 46 (1972-73), pp. 452, 456. But see also Wertheimer in *Common Market Law Review*, 10 (1973), p. 386, at pp. 408-10.

<sup>2</sup> This statement seems odd at first sight, because agreements which have not been notified are not eligible for exemption under Article 85 (3)—unless they are exempt from notification by virtue of Article 5 (2) of Regulation 17.

<sup>3</sup> See Wertheimer, loc. cit. (above, n. 1), pp. 413-15.

<sup>4</sup> Or, to be precise, provisionally void, since an exemption subsequently granted by the Commission under Article 85 (3) may have retroactive effect; see Wertheimer, loc. cit. (above, n. 1), pp. 402-3.



Commission's decision is known, or he can refer the case to the Court of Justice of the European Communities under Article 177. There is something to be said for giving a judge such a choice, but it does make the outcome of litigation rather uncertain.

The Court also said:

Whilst these considerations refer particularly to agreements which must be notified in accordance with Article 4 of the Regulation, they apply equally to agreements exempted from notification, such exemption merely constituting an inconclusive indication that the agreements referred to are generally less harmful to the smooth functioning of the Common Market.

In other words, old agreements exempted from notification enjoy provisional validity,<sup>1</sup> but new agreements exempted from notification (such as the agreements between the plaintiff and the defendant in the present case) do not.

The Court then turned to the first question asked by the Liège Commercial Tribunal:

The first question asks whether the procedure under Articles 2, 3 and 6 of Regulation No. 17 must be considered to be initiated by the Commission from the moment it acknowledges receipt of a request for a negative clearance or of a notification for the purposes of obtaining exemption as provided for by Article 85 (3) of the Treaty.

The question obviously concerns the provisions of Article 9 (3) of the Regulation, under the terms of which 'as long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the member States shall remain competent to apply Article 85 (1) in accordance with Article 88 of the Treaty'.

Without the necessity of re-examining the question whether by the words 'authorities of the member States' Article 9 also refers to the national courts acting pursuant to Article 85 (2) of the Treaty,<sup>2</sup> it is sufficient in this case to establish that Article 9, when referring to the initiation of a procedure under Articles 2, 3 or 6, obviously concerns an authoritative act of the Commission, evidencing its intention of taking a decision under the said Articles.

A simple acknowledgement of receipt, far from being evidence of intention, constitutes merely an administrative action and cannot be considered as such an authoritative act.

Consequently, the simple acknowledgement of receipt of a request for a negative clearance or of a notification for the purposes of obtaining exemption under Article 85 (3) of the Treaty cannot be considered as initiating a procedure under Articles 2, 3 or 6 of Regulation No. 17.<sup>3</sup>

The Court's answer is perfectly clear, but it would have been more helpful if the Court had gone on to say exactly what acts did constitute the initiation of a procedure within the meaning of Article 9 (3).<sup>4</sup>

The second question asked by the Liège Commercial Tribunal arose from the fact that it was not until 1969 that the plaintiff notified to the Commission a standard-form contract containing the same clauses as the contracts entered into in 1963. Regulations 27/62 and 1133/68 provide that a party who uses standard-form contracts will be regarded as complying with the requirement of notification if he notifies a single specimen of the contracts; the names of the other parties do not need to be

<sup>1</sup> *Bilger v. Jehle*, *Recueil de la jurisprudence*, 16 (1970), p. 127, and [1974] 1 C.M.L.R. 382, noted in this *Year Book*, 44 (1970), p. 245. But see Wertheimer in *Common Market Law Review*, 10 (1973), p. 386, at pp. 407-8.

<sup>2</sup> On this point, see below, pp. 418-21.

<sup>3</sup> In the light of this ruling, the penultimate paragraph of the author's case-note on *Bilger v. Jehle* is no longer correct (this *Year Book*, 44 (1970), p. 245 at p. 247).

<sup>4</sup> On this point, see the observations of Mr. Advocate-General Roemer: [1973] E.C.R. 94-6. See also Mr. Advocate-General Mayras in the *SABAM* case: [1974] E.C.R. 51, 71-2.

communicated.<sup>1</sup> The Court interpreted these regulations to mean that due notification of one standard contract is to be considered as due notification of all contracts in the same terms, *including prior ones*, entered into by the same undertaking. However, the Court added:

... notification given in 1969, and therefore outside the time limits laid down by Articles 5 (1) and 7 (2) of Regulation No. 17, is not such as to make notified standard contracts, even if they existed before the entry into force of that Regulation, old agreements.

The third question asked by the Liège Commercial Tribunal read as follows:

Is the nullity of contracts exempted from notification to be deemed to take effect from the date when one of the contracting parties duly brings an action for it or merely from the date of the judgment or the decision of the Commission which establishes it?

The Court's answer was extremely brief:

It follows from the general considerations above that Article 85 (2) renders agreements and decisions prohibited pursuant to that Article automatically void.

Such nullity is therefore capable of having a bearing on all the effects, either past or future, of the agreement or decision.

Consequently, the nullity provided for in Article 85 (2) is of retroactive effect.

Presumably, if the 'nullity is ... capable of having a bearing on all the [past] effects ... of the agreement', it should stretch back to the time when the agreement was made, and not merely to the time when one of the contracting parties raised a plea of nullity; but the Court's judgment is not specific on this point.

In ruling that the nullity provided for in Article 85 (2) had retroactive effect in the case of agreements exempted from notification, the Court refused to follow dicta in its previous decision in *Bilger v. Jähle*,<sup>2</sup> not to mention Mr. Advocate-General Roemer's submissions in the present case. However, the Court had held earlier in the *Bosch* case<sup>3</sup> that the nullity provided for in Article 85 (2) had a retroactive effect in the case of agreements liable to notification, so the Court's judgment in the present case has introduced a measure of uniformity into the law. It should also be noted that in this context the Court's judgment in the second *Brasserie de Haecht* case makes no distinction between 'old' and 'new' agreements, although presumably the retroactive nullity of 'old' agreements would not apply to the period before the entry into force of Regulation 17.<sup>4</sup>

#### *Abuse of a dominant position on the market—company takeovers*

*Case No. 3. Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities.*<sup>5</sup> During 1969 the second plaintiff, an American company manufacturing cans, acquired 85.8 per cent of the shares in Schmalbach-Lubeca-Werke A.G. (hereinafter called S.L.W.), a German can manufacturer. In 1970 the second plaintiff set up a wholly owned subsidiary in the United States called Europemballage Corporation, to which it transferred all its shares in S.L.W. On instructions

<sup>1</sup> For an earlier case on these regulations, see *Parfums Marcel Rochas v. Bitsch*, *Recueil de la jurisprudence*, 16 (1970), p. 515, and [1971] C.M.L.R. 104, noted in this *Year Book*, 45 (1971), p. 429.

<sup>2</sup> See above, p. 409 n. 1.

<sup>3</sup> *Recueil de la jurisprudence*, 8 (1962), p. 89; [1962] C.M.L.R. 1.

<sup>4</sup> This point was laid down in the *Bosch* case as regards agreements liable to notification; presumably it would now apply also to agreements exempted from notification.

<sup>5</sup> [1973] E.C.R. 215.

from Continental Can, Europemballage made a successful takeover bid for Thomassen & Drijver-Verblifa N.V. (hereinafter called T.D.V.), a Dutch can manufacturer. The Commission of the European Communities decided that the takeover of T.D.V. was a violation of Article 86 of the E.E.C. Treaty and ordered Continental Can to put an end to that violation. The plaintiffs appealed to the Court against the Commission's decision.

The Court began by rejecting various complaints by the plaintiffs against the procedure followed by the Commission.<sup>1</sup> It went on to reject a plea that international law prohibited the Commission from exercising jurisdiction over Continental Can because Continental Can did not have a registered office in the Community and did not exercise any activity on the territory of member States. The Court held that Europemballage's actions in the present case had been carried out on Continental Can's instructions and were therefore attributable to Continental Can; moreover, Community law was applicable to the takeover of T.D.V., apparently because 'such an acquisition . . . influences market conditions within the Community'.<sup>2</sup>

The Court then turned to examine the merits of the case. Article 86 of the E.E.C. Treaty prohibits 'any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it . . . in so far as it may affect trade between member States'. The Commission contended that the plaintiffs, through S.L.W., already held a dominant position in a substantial part of the Common Market (viz. Germany) and that they had abused their dominant position by taking over T.D.V., because the takeover had the effect of practically eliminating competition over a substantial part of the Common Market. The plaintiffs, however, interpreted Article 86 as applying only to acts which had a direct and adverse effect on customers or suppliers; a takeover, on the other hand, had no such direct and adverse effects, but merely gave the acquiring company a greater *possibility* of abusing its dominant position in the future.

The Court held that Article 86 must be interpreted in the light of Article 3 (f), according to which the Community's activity shall include the institution of a system ensuring that competition in the Common Market is not distorted.

But if Article 3 (f) provides for the institution of a system ensuring that competition in the Common Market is not distorted, then it requires *a fortiori* that competition must not be eliminated.

The Court then compared Articles 85 and 86.

Article 85 concerns agreements between undertakings, decisions of associations of undertakings and concerted practices, while Article 86 concerns unilateral activity of one or more undertakings. Articles 85 and 86 seek to achieve the same aim on different levels, viz. the maintenance of effective competition within the Common Market. The restraint of competition which is prohibited if it is the result of behaviour falling under Article 85 cannot become permissible by the fact that such behaviour succeeds under the influence of a dominant undertaking and results in the merger of the undertakings concerned. In the absence of explicit provisions one cannot assume that the

<sup>1</sup> The Court's rulings on these points of procedure are not discussed in the present case-note, because they add nothing to the Court's rulings in previous cases (cf. this *Year Book*, 45 (1971), pp. 426-7, and 46 (1972-3), pp. 452-3).

<sup>2</sup> This ruling by the Court is stated in terms which are probably too wide and vague; the crucial points are that T.D.V. had the nationality of a member State and carried on most (if not all) of its business in the member States of the E.E.C.; see this *Year Book*, 46 (1972-3), pp. 201-2 and 206-7.



Treaty, which prohibits in Article 85 certain decisions of ordinary associations of undertakings restricting competition without eliminating it, permits in Article 86 that undertakings, after merging into an organic unity, should reach such a dominant position that any serious chance of competition is practically rendered impossible. Such a diverse legal treatment would make a breach in the entire competition law which could jeopardize the proper functioning of the Common Market. If, in order to avoid the prohibitions in Article 85, it sufficed to establish such close connections between the undertakings that they escaped the prohibition of Article 85 without coming within the scope of Article 86, then, in contradiction to the basic principles of the Common Market, the partitioning of a substantial part of this market would be allowed.<sup>1</sup>

The Court therefore concluded:

Abuse [of a dominant position] may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one.<sup>2</sup>

Having decided this issue of principle in favour of the Commission, the Court decided against the Commission on the facts, because the Court was not satisfied with the Commission's finding that S.L.W. held a dominant position in the market. The market in question was the market in cans for meat, meat products, fish and crustacea and in metal tops for glass jars. The Court, however, was not satisfied with the assumption implicit in the Commission's decision that the market in cans for meat, meat products, fish and crustacea was distinct from the market in cans for other foodstuffs such as fruit and vegetables.

Consequently, a dominant position on the market for light metal containers for meat and fish cannot be decisive, so long as it has not been proved that competitors from other sectors of the market for light metal containers are not in a position to enter this market, by a simple adaptation, with sufficient strength to create a serious counterweight.

The Court also pointed to inaccuracies and contradictions in the statement of reasons for the Commission's decision, relating to such matters as the cost of transporting to Germany cans made in other member States by other companies, and the feasibility of canners producing their own cans.

The Court concluded that the decision had not sufficiently set out (*dargetan*) the facts and assessments on which it was based, and therefore annulled it.

The Commission had the consolation of knowing that the Court had interpreted Article 86 in the way advocated by the Commission. And yet Article 86, even after the *Continental Can* case, does not provide a very effective control over company takeovers. In the first place, it applies only to takeovers by a company which already holds a dominant position; it does not apply to takeovers whereby a company acquires a dominant position for the first time. Secondly, companies are not obliged to obtain the approval of the Commission before making takeovers, as opposed to running the risk

<sup>1</sup> With respect, this argument proves too much. Article 85 prohibits all agreements between undertakings, and not merely agreements between undertakings which, between them, hold a dominant position; but Article 86 applies only to undertakings which hold a dominant position. Thus, in the case of undertakings which do not, between them, hold a dominant position, a merger does enable the undertakings in question to escape the prohibition in Article 85 without subjecting them to the prohibition in Article 86—contrary to what the Court implied.

<sup>2</sup> In the light of other passages in the judgment, it would seem that an undertaking's 'behaviour depends on the dominant one', not only when the first undertaking is controlled by the dominant one, but also when it is so small in comparison with the dominant undertaking that it cannot provide *effective* competition.

of censure after the event. (It is true that companies may apply for negative clearance under Article 2 of Regulation 17, but they are not obliged to do so; besides, there is no guarantee that the Commission will reply promptly to a request for negative clearance, and negative clearance does not provide conclusive proof that the takeover is compatible with Article 86.) It is therefore not surprising that the Commission has now asked the Council to enact a regulation under Article 235 (the so-called implied powers article) of the E.E.C. Treaty which will give the Commission increased powers to control company takeovers.<sup>1</sup>

*Abuse of a dominant position on the market—refusal to sell—effect on trade between member States—remedies*

*Case No. 4. Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission of the European Communities.*<sup>2</sup> Commercial Solvents Corporation (hereinafter called C.S.C.) is a United States company which manufactures and sells, *inter alia*, nitropropane, a chemical derived from the nitration of paraffin, and aminobutanol, a derivative of nitropropane. Both are intermediary products for the manufacture of ethambutol and ethambutol-based specialities, used for the treatment of tuberculosis. In 1962 C.S.C. acquired 51 per cent of the voting shares in Istituto Chemioterapico Italiano S.p.A. (hereinafter called Istituto), an Italian company.

Until 1970 Istituto acted as a reseller of aminobutanol produced by C.S.C. in the United States. One of Istituto's customers was another Italian company known as Zoja, which used the product in the manufacture of ethambutol-based specialities. In 1970 Istituto started production of its own ethambutol-based specialities. In 1970 C.S.C. decided that it would no longer supply nitropropane and aminobutanol to the E.E.C., but would instead supply dextro-aminobutanol, an up-graded intermediate product, which Istituto would convert to bulk ethambutol for sale in the E.E.C. and elsewhere, and for the manufacture of its own specialities. At the end of 1970 Zoja tried to buy aminobutanol from Istituto, but Istituto replied that C.S.C. had refused to supply aminobutanol to Istituto. Further attempts by Zoja to buy aminobutanol on the world market failed; there was only one possible source of supply, namely C.S.C., but C.S.C. refused to supply aminobutanol. Zoja complained to the Commission of the European Communities, which eventually, on 14 December 1972, took a decision in which it held that C.S.C. and Istituto had violated Article 86 of the E.E.C. Treaty by refusing to supply Zoja, and ordered C.S.C. and Istituto to pay a fine of 200,000 units of account and, under penalty of a fine of 1,000 units of account per day of delay, to sell 60,000 kilograms of nitropropane or 30,000 kilograms of aminobutanol to Zoja and to submit to the Commission within two months proposals for the subsequent supply of Zoja. C.S.C. and Istituto appealed against the decision to the Court of Justice.

Article 86 of the E.E.C. Treaty prohibits 'abuse of a dominant position within the Common Market . . . in so far as it may affect trade between member States'. The applicants challenged the Commission's findings that they had 'a world monopoly in the production and sale of nitropropane and aminobutanol' and that they therefore 'held a dominant position in the Common Market for the raw material necessary for the manufacture of ethambutol'. The Court said:

For this purpose they rely on documents which, they claim, establish that aminobutanol is produced by at least one other Italian company from butanone, that a third Italian company manufactures ethambutol from other raw material, that a French

<sup>1</sup> [1973] C.M.L.R. D205.

<sup>2</sup> [1974] E.C.R. 223.



company produced nitropropane independently and that another undertaking has brought thiophenol on to the market, a product which is said to be used in Eastern Europe to produce ethambutol.

Finally, C.S.C. produced a statement by an expert according to which there is at least one practical method of producing nitropropane other than the method used by C.S.C. and at least three other processes for producing aminobutanol without using nitropropane.

. . . The Commission replied, without being seriously challenged, that the production of nitropropane by the French company is at present only in an experimental stage and that the researches of this company have been developed only subsequently to the events in dispute. The information as to the possibility of manufacturing ethambutol by using thiophenol is too vague and uncertain to be seriously considered. The statement of the expert produced by C.S.C. takes account only of well-known processes which have not proved themselves capable of adaptation to use on an industrial scale and at prices enabling them to be marketed. The production by the two Italian companies mentioned is on a modest scale and intended for their own needs, so that the processes used do not lend themselves to substantial and competitive marketing.

The Commission has produced an expert's opinion from Zoja according to which the production of aminobutanol based on butanone on a substantial industrial scale would be possible only at considerable expense and at some risk, which is disputed by the applicants who rely on two experts, according to whom such production would not present any difficulties or cause excessive costs.

This dispute is of no great practical importance since it relates mainly to processes of an experimental nature, which have not been tested on an industrial scale and which have resulted in only a modest production. The question is not whether Zoja, by adapting its installations and its manufacturing processes, would have been able to continue its production of ethambutol based on other raw materials, but whether C.S.C. had a dominant position in the market in raw material for the manufacture of ethambutol. It is only the presence on the market of a raw material which could be substituted without difficulty for nitropropane or aminobutanol for the manufacture of ethambutol which could invalidate the argument that C.S.C. has a dominant position within the meaning of Article 86. On the other hand reference to possible alternative processes of an experimental nature or which are practised on a small scale is not sufficient to refute the grounds of the decision in dispute.

It is not disputed that the large manufacturers of ethambutol on the world market, that is to say C.S.C. itself, Istituto, American Cyanamid and Zoja use raw material manufactured by C.S.C. Compared with the manufacture and sale of ethambutol by these undertakings, those of the few other manufacturers are of minor importance. The Commission was therefore entitled to conclude 'that in the present conditions of economic competition it is not possible to have recourse on an industrial scale to methods of manufacture of ethambutol based on the use of different raw materials'.

The applicants also urged that the market for ethambutol could not be considered in isolation from the market for other anti-tuberculosis drugs, which were largely interchangeable with ethambutol.<sup>1</sup> Since there was no separate market in ethambutol, there could be no separate market in the raw materials for the manufacture of ethambutol. However, the Court disagreed:

. . . it is . . . possible to distinguish the market in raw material necessary for the manufacture of a product from the market on which the product is sold. An abuse of a dominant position on the market in raw materials may thus have effects restricting competition in the market on which the derivatives of the raw material are sold and these effects must

<sup>1</sup> Cf. the *Continental Can* case, above, p. 412.



be taken into account in considering the effects of an infringement, even if the market for the derivative does not constitute a self-contained market.<sup>1</sup>

Having thus held that the applicants enjoyed a dominant position on the relevant market, the Court went on to find that they had abused it. The applicants had restricted their sales of nitropropane and aminobutanol in order to maximize their production and sales of the derivatives.

However, an undertaking, being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers), act in such a way as to eliminate their competition which, in the case in question, would amount to eliminating one of the principal manufacturers of ethambutol in the Common Market. Since such conduct is contrary to the objectives expressed in Article 3 (f) of the Treaty and set out in greater detail in Articles 85 and 86, it follows that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86.

The Court also noted that C.S.C. could have supplied Zoja without suffering any hardship, since Zoja wished to buy only 5 or 6 per cent of C.S.C.'s global production of nitropropane.

The applicants contended that there had been no breach of Article 86 because trade between member States had not been affected.

The applicants argue that in this case it is principally the world market which is affected, since Zoja sells 90 per cent of its production outside the Common Market and in particular in the developing countries, and that constitutes a much more important market for anti-tuberculosis drugs than the countries of the Community, where tuberculosis has largely disappeared. The sales outlets of Zoja in the Common Market are further reduced by the fact that in many member States Zoja is blocked by the patents of other companies, in particular American Cyanamid, which prevent it from selling its specialities based on ethambutol.<sup>2</sup>

However, the Court found that

... Zoja is at present able to export and does indeed export the products in question to at least two member States. These exports are endangered by the difficulties caused to this company, and, by reason of this, trade between member States may be affected.

But the Court also gave a more fundamental reason for rejecting the applicants' contentions:

The prohibitions of Articles 85 and 86 must in fact be interpreted and applied in the

<sup>1</sup> Mr. Advocate-General Warner agreed with the applicants that the market for raw materials could not be divorced from the market for the finished product, but he considered that other anti-tuberculosis drugs were not interchangeable with ethambutol, because they were usually used in combination with it, not as substitutes for it: [1974] E.C.R. 266.

<sup>2</sup> Mr. Advocate-General Warner dealt with the problem of patents in the following words:

The mere fact that one concern is entitled to restrict the trade of another by the exercise of patent rights does not mean that a third is free to restrict it also by abusing a dominant position. The circumstance that a man is about to drown does not entitle another to shoot him.

He also mentioned various facts and rules of law which suggested that the patents of other companies did not completely prevent Zoja from exporting its specialities based on ethambutol from Italy to other member States of the E.E.C.: [1974] E.C.R. 271.

light of Article 3 (f) of the Treaty, which provides that the activities of the Community shall include the institution of a system ensuring that competition in the Common Market is not distorted, and Article 2 of the Treaty, which gives the Community the task of promoting 'throughout the Community harmonious development of economic activities'. By prohibiting the abuse of a dominant position within the market in so far as it may affect trade between member States, Article 86 therefore covers abuse which may directly prejudice consumers as well as abuse which indirectly prejudices them by impairing the effective competitive structure as envisaged by Article 3 (f) of the Treaty.

The Community authorities must therefore consider all the consequences of the conduct complained of for the competitive structure in the Common Market without distinguishing between production intended for sale within the market and that intended for export. When an undertaking in a dominant position with the Common Market abuses its position in such a way that a competitor in the Common Market is likely to be eliminated, it does not matter whether the conduct relates to the latter's exports or its trade within the Common Market, once it has been established that this elimination will have repercussions on the competitive structure within the Common Market.

The Commission's decision was based on, *inter alia*, a finding that C.S.C. exercised a power of control over Istituto and that the two companies therefore constituted a single economic unit. The applicants disputed this finding. C.S.C. argued that the Commission had no jurisdiction over C.S.C. because C.S.C. was a United States company and because C.S.C.'s only relevant connections with the E.E.C. was that it had once exported nitropropane and aminobutanol to the E.E.C. and had later made the policy decision to discontinue such sales. C.S.C. might have a dominant position on the world market, but it had not acted within the E.E.C., and was therefore not subject to Community law. On the other hand, Istituto, considered separately from C.S.C., did not have a dominant position and therefore was not guilty of a breach of Article 86, notwithstanding that it had acted within the Community.

However, the Court agreed with the Commission that the two companies should be treated as a single economic unit. C.S.C. held 51 per cent of the voting shares in Istituto; C.S.C. appointed 50 per cent of the directors of Istituto, including the Chairman of the Board of Directors, who had an additional casting vote; the annual reports of C.S.C. described Istituto as one of its subsidiaries. The Court does not seem to have treated these facts alone as conclusive: what was conclusive was that all the evidence indicated that C.S.C. had *actively exercised* its power of control over Istituto.<sup>1</sup>

The Court therefore held that the two companies were jointly and severally responsible for the conduct complained of.

Article 3 of Regulation 17 provides:

Where the Commission . . . finds that there is infringement of Article 85 or Article 86

<sup>1</sup> Mr. Advocate-General Warner adopted a slightly different approach. He suggested 'that there is a presumption that a subsidiary will act in accordance with the wishes of its parent because according to common experience subsidiaries generally do so act'; this presumption would, in most circumstances, be very difficult to rebut; unless it was rebutted, the two companies would have to be treated as a single economic unit for the purposes of Articles 85 and 86 of the E.E.C. Treaty (*ibid.*, p. 264).

As regards presumptions, and the onus of proof generally, cf. Mr. Advocate-General Warner's remarks on p. 269. The Court has never given a clear ruling on onus of proof in cases brought before the Court under Article 172 of the E.E.C. Treaty (no doubt the fact that the Court has a *compétence de pleine juridiction* usually enables it to investigate the facts for itself without placing the onus of proof on either party); dicta in some previous cases seem to imply that the onus is on the Commission (see this *Year Book*, 45 (1971), p. 428, and see above, p. 412), although in special circumstances the onus will be placed on the applicant (see this *Year Book*, 46 (1972-3), pp. 452 and 456).



of the Treaty, it may by decision require the undertakings . . . concerned to bring such infringement to an end.

The applicants argued that Article 3 did not empower the Commission to order them to sell goods to Zoja and to submit proposals to the Commission for the subsequent supply of Zoja. The Court disagreed, holding that decisions under Article 3 . . . may include an order to do certain acts or provide certain advantages which have been wrongfully withheld as well as prohibiting the continuation of certain actions, practices or situations which are contrary to the Treaty. For this purpose the Commission may, if necessary, require the undertaking concerned to submit to it proposals with a view to bringing the situation into conformity with the requirements of the Treaty.<sup>1</sup>

The applicants also complained that the Commission had misused the powers intended to prevent competition from being distorted within the Common Market and applied the provisions of Article 86 beyond the territory of the Community by ordering supplies disproportionate to the needs of Zoja for the supply of its customers within the Community and which correspond rather to its activities in the world market.

The applicants said that they should have been required to sell only enough nitropropane or aminobutanol to enable Zoja to supply its customers within the E.E.C. The Court took a different view; Zoja's survival as a competitor within the E.E.C. depended on its ability to export outside the E.E.C. (because production for the E.E.C. alone would have been uneconomic), and therefore Zoja was entitled to receive the raw materials which it needed for its sales outside the E.E.C. as well as its sales inside the E.E.C.

On this particular point there had been a gap in the statement of reasons in the Commission's decision, and Mr. Advocate-General Warner considered that this constituted a breach of Article 190 of the Treaty, which requires reasons to be stated for decisions. The Court adopted a more liberal view; the reasons for the Commission's decision on this point were implicit in the attitude which the Commission had adopted since the beginning of its investigations. The Commission had consistently

. . . maintained that since the conduct complained of aimed at eliminating one of the principal competitors within the Common Market, it was above all necessary to prevent such an infringement of Community competition by adequate measures. Both in the disputed decision and in the written procedure the measures taken were justified by the necessity of preventing the conduct of C.S.C. and Istituto having the effect referred to and eliminating Zoja as one of the principal manufacturers of ethambutol in the Community. This reasoning is at the root of the litigation and cannot therefore be considered as insufficient.

Lastly the Court examined the amount of the fine imposed on the applicants.

Although the seriousness of the infringement justifies a heavy fine, the duration of the infringement should also be taken into account, which in the decision was calculated as two years or more, but it might have been shorter if the Commission, which had been put on inquiry by the complaint of Zoja on 8 April 1971, that is six months after the first refusal by C.S.C.-Istituto, had intervened more quickly.<sup>2</sup> Moreover the ill effects of the

<sup>1</sup> See also the remarks of Mr. Advocate-General Warner: [1974] E.C.R. 272. The Court's ruling is presumably capable of being applied to other situations; for instance, in the case of an illegal takeover of one company by another, the Commission could order divestiture of the assets wrongfully acquired.

<sup>2</sup> The delay by the Commission was in glaring contrast with the brevity of the time (fifteen days) which the Commission had given the applicants to reply to the charges against them in the



conduct complained of have been limited by reason of the fact that C.S.C.-Istituto have provided the supplies ordered by the decision.

The Court therefore reduced the amount of the fine by half. However, it ordered the applicants to pay the costs of the proceedings, since they had failed on most of the points raised in their appeal.

*Abuse of a dominant position in the market—conflict of jurisdiction between national and Community authorities—associations exploiting copyright in music*

*Case No. 5. Belgische Radio en Televisie and Société belge des auteurs, compositeurs et éditeurs v. S.V. SABAM and N.V. Fonior.*<sup>1</sup> The Belgian Association of Authors, Composers and Publishers (SABAM) is a co-operative association which exploits the copyrights of its members. In 1963 and 1967 Mr. Davis, a composer, and Mr. Rosenstraten, a song writer, entered into standard form contracts with SABAM whereby they assigned to SABAM their copyrights in all their present and future compositions. In 1969 Mr. Davis and Mr. Rosenstraten (apparently acting with the consent of SABAM, although the report does not make this clear) assigned to Belgische Radio en Televisie (BRT) the copyright in a song which they had written. Later in 1969 SABAM and BRT brought actions for breach of copyright before the Tribunal de première instance of Brussels against Fonior, which had marketed records of the song. During these proceedings the question arose whether the contracts which Mr. Davis and Mr. Rosenstraten had signed with SABAM were void for breach of the rules prohibiting restrictions on competition laid down in the E.E.C. Treaty, and in 1973 the Brussels Tribunal therefore asked the Court of Justice of the European Communities to interpret Articles 86 and 90 of the E.E.C. Treaty.

Meanwhile, in 1970, the Commission of the European Communities initiated administrative proceedings against SABAM under Article 3 of Regulation 17, for the purpose of deciding whether certain provisions in the standard form contracts between SABAM and its members were contrary to Article 86 of the E.E.C. Treaty. The administrative proceedings were still in progress at the time when the Court of Justice of the European Communities gave judgment.<sup>2</sup>

SABAM appealed to the Brussels Court of Appeal against the order of the Brussels Tribunal seeking the interpretation of Articles 86 and 90. SABAM argued that the initiation of administrative proceedings by the Commission under Article 3 of Regulation 17 suspended the jurisdiction of national courts; since the Brussels Tribunal had no jurisdiction to decide the case, it had no jurisdiction to seek a preliminary ruling from the Court of Justice of the European Communities.

In its judgment of 30 January 1973 the Court of Justice decided that it ought to give a preliminary ruling on the interpretation of Articles 86 and 90.<sup>3</sup>

In the first place, the Court held that the fact that an appeal was pending against the administrative hearings preceding the Commission's decision. Mr. Advocate-General Warner considered that the excessive brevity of the time limit was illegal, and that the Court should therefore at least condemn the Commission to pay the costs of the proceedings: [1974] E.C.R. 274-5. The Court did not mention the brevity of the time limit; maybe it thought that the brevity of the time limit had not injured the applicants, either because they had been able to state their case fully to the Commission, or because a fuller statement of their case would not have led to an alteration in the content of the Commission's decision (cf. this *Year Book*, 45 (1971), pp. 426-7).

<sup>1</sup> [1974] E.C.R. 51 and 313.

<sup>2</sup> They came to an end when the Commission gave its decision on 29 March 1974, i.e. two days after the second judgment of the Court of Justice of the European Communities.

<sup>3</sup> [1974] E.C.R. 51.

order of the Brussels Tribunal did not justify the Court in refusing to give a ruling; the Treaty confers on national courts the right to judge whether a decision on a point of Community law is necessary for their judgments,<sup>1</sup> and consequently the procedure under Article 177 of the Treaty 'continues as long as the request of the national court has neither been withdrawn nor become devoid of object'.

Presumably a request could be withdrawn either by the national court which made the request or by another national court hearing an appeal against the order of the first court, but in either case the withdrawal must be expressly communicated to the Court of Justice of the European Communities; to hold, as SABAM suggested, that the filing of an appeal had the effect of automatically and impliedly withdrawing the request would involve the Court of Justice of the European Communities in applying national rules of civil procedure, and possibly in resolving disputes about the interpretation of such rules—things which the Court has no jurisdiction to do.

It is also submitted that a request from a national court 'become[s] devoid of object' only when it is absolutely clear that proceedings are no longer pending in the national courts—either because the parties have discontinued the proceedings, or because a national court has given a judgment on the merits which is not open to attack in any court in the State concerned<sup>2</sup> (this would include not only a judgment by the highest court in the State, but also a judgment of a lower court which has become final as a result of the expiry of the time limit for appealing).

SABAM's argument about the effect of the Commission's initiation of administrative proceedings upon the jurisdiction of national courts raised a more difficult problem. Article 9 (3) of Regulation 17 provides that 'as long as the Commission has not initiated any procedure under Articles 2, 3 or 6 [of Regulation 17], the authorities of the member States shall remain competent to apply Article 85 (1) and Article 86 in accordance with Article 88 of the Treaty'. The obvious inference is that the initiation of a procedure under Article 3 suspends the jurisdiction of national authorities until the Commission has given its decision under Article 3. SABAM argued that civil courts, before which the prohibitions contained in Articles 85 and 86 are invoked in a dispute governed by private law, must be considered as 'authorities of the member States' for the purposes of Article 9 (3), but the Court disagreed.

The competence of those courts to apply the provisions of Community law, particularly in the case of such disputes, derives from the direct effect of those provisions.

As the prohibitions of Articles 85 (1) and 86 tend by their very nature to produce

<sup>1</sup> It follows that the Court of Justice of the European Communities cannot refuse to answer the questions asked by the national court on the grounds that an answer to the questions is not necessary in order to enable the national court to decide the case; the national court is sole judge of the relevance of the questions to the facts of the case: *Sacchi* case, [1974] E.C.R. 409. Nor can the Court of Justice refuse to answer the questions on the grounds that the proceedings in the national court were undefended: *Birra Dreher* case, [1974] E.C.R. 201.

<sup>2</sup> i.e. a judgment which terminates the proceedings *completely*. A judgment by a higher court which sends the case back for reconsideration by a lower court does not terminate the proceedings completely. In such circumstances the lower court may refer the case to the Court of Justice of the European Communities under Article 177 if it thinks that the higher court disregarded or misinterpreted relevant rules of Community law, notwithstanding rules of national law which regard the decision of the higher court as binding on the lower court: *Rheinmühlen-Düsseldorf* case, [1974] E.C.R. 33. If the lower court can make such a reference *after* the decision of the higher court (as in the *Rheinmühlen-Düsseldorf* case), it would seem that a reference made by the lower court *before* the decision of the higher court would not lapse by sole reason of the decision of the higher court (or, to be precise, it would not lapse *automatically*—as stated above, either the higher court or the lower court could withdraw the reference, provided that the withdrawal was expressly communicated to the Court of Justice of the European Communities).



direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard.

To deny, by virtue of the aforementioned Article 9, the national courts' jurisdiction to afford this safeguard, would mean depriving individuals of rights which they hold under the Treaty itself.

The fact that Article 9 (3) refers to 'the authorities of the member States' competent to apply the provisions of Articles 85 (1) and 86 'in accordance with Article 88' indicates that it refers solely to those national authorities whose competence derives from Article 88.

Under that Article the authorities of the member States—including in certain member States courts especially entrusted with the task of applying domestic legislation on competition or that of ensuring the legality of that application by the administrative authorities—are also rendered competent to apply the provisions of Articles 85 and 86 of the Treaty.

The fact that the expression 'authorities of the member States' appearing in Article 9 (3) of Regulation 17 covers such courts cannot exempt a court before which the direct effect of Article 86 is pleaded from giving judgment.

The Court here seems to be making a distinction between two types of national courts. On the one hand there are courts which are 'especially entrusted with the task of applying domestic legislation on competition or that of ensuring the legality of that application by the administrative authorities' (e.g. the Restrictive Practices Court in England). These courts apply Articles 85 and 86 *directly*, but they do not decide disputes between individuals, and their jurisdiction to apply Articles 85 and 86 derives from Article 88, with the result that they are regarded as 'authorities of the member States' for the purposes of Article 9 (3). On the other hand there are national courts which apply Articles 85 and 86 as an incidental or collateral question in actions between individuals for tort or breach of contract. Their jurisdiction to apply Articles 85 and 86 derives not from Article 88, but from the self-executing nature of Articles 85 and 86, and consequently they are not 'authorities of the member States' for the purposes of Article 9 (3).

Courts in the latter category were not obliged to suspend their proceedings by Article 9 (3), but they were nevertheless at liberty to suspend their proceedings if they thought that justice so required.

Nevertheless, if the Commission initiates a procedure in application of Article 3 of Regulation 17 such a court may, if it considers it necessary for reasons of legal certainty, stay the proceedings before it while awaiting the outcome of the Commission's action.

On the other hand, the national court should generally allow proceedings before it to continue when it decides either that the behaviour in dispute is clearly not capable of having any appreciable effect on competition or on trade between member States, or that there is no doubt of the incompatibility of that behaviour with Article 86.<sup>1</sup>

The competence of such a court to refer a request for a preliminary ruling to the Court of Justice cannot be fettered by Article 9 of Regulation 17.

Consequently, as the preliminary questions of the Tribunal de première instance of Brussels have been duly referred to the Court the latter is bound to give a reply.

The Court's interpretation of Article 9 (3) conflicts with the interpretation which it gave in *Bilger v. Jehle*.<sup>2</sup> The Court followed its usual practice of not referring to its previous judgments, so one cannot tell whether the Court intended to distinguish *Bilger v. Jehle*

<sup>1</sup> This echoes a passage from the judgment in the second *Brasserie de Haecht* case; see above, p. 408.

<sup>2</sup> *Recueil de la jurisprudence*, 16 (1970), pp. 127, 137, and [1974] 1 C.M.L.R. 382, 391, noted in this *Year Book*, 44 (1970), pp. 245, 246.



or whether it was simply not following *Bilger v. Jehle*. It is submitted, however, that the conflict between the two judgments is so glaring that the cases cannot be reconciled by means of distinguishing. The most one can say is that the Court's remarks in *Bilger v. Jehle* were probably an *obiter dictum* and not part of the *ratio decidendi*; but the English distinction between *obiter dicta* and *ratio decidendi* is not really applicable to the Court of Justice of the European Communities, at least in cases decided under Article 177, where the Court gives an abstract ruling of law and does not apply it to the facts of the case. The Court is not bound by its previous decisions, so there is nothing shocking in concluding that in the *SABAM* case the Court refused to follow *Bilger v. Jehle*.

In a second judgment delivered on 27 March 1974 the Court replied to the questions asked by the Brussels Tribunal.<sup>1</sup>

Article 86 of the E.E.C. Treaty prohibits 'abuse . . . of a dominant position within the Common Market or in a substantial part of it . . .'. The Brussels Tribunal was apparently of the opinion that *SABAM* held a dominant position (indeed, a *de facto* monopoly) in Belgium and thus in a substantial part of the Common Market.<sup>2</sup> The problem was whether *SABAM*'s terms of membership constituted an abuse of that dominant position. The Brussels Tribunal's first two questions were as follows:

Can the fact that an undertaking which enjoys a *de facto* monopoly in a member State for the management of copyrights requires the global assignment of all such rights without drawing any distinction between specific categories be regarded as an abuse of a dominant position within the meaning of Article 86 of the E.E.C. Treaty?

Can abuse of a dominant position also consist in the fact that such an undertaking stipulates that an author shall assign his present and future rights, and in particular in the fact that, without having to give an account of its action, that undertaking may continue to exercise the rights assigned for five of the association's years following the withdrawal of the member?

The Court of Justice of the European Communities pointed out that one of the examples of abuse listed in Article 86 was 'directly or indirectly imposing . . . unfair trading conditions'. The Court said:

It is therefore necessary to investigate whether the copyright association, through its statutes or contracts concluded with its members, is imposing, directly or indirectly, unfair conditions on members or third parties in the exploitation of works, the protection of which has been entrusted to it.

For this appraisal account must be taken of all the relevant interests, for the purpose of ensuring a balance between the requirement of maximum freedom for authors, composers and publishers to dispose of their works and that of the effective management of their rights by an undertaking which in practice they [cannot] avoid joining.<sup>3</sup>

To determine whether, in these circumstances, the practices mentioned in the referring judgment constitute an abuse within the meaning of Article 86 of the Treaty account must however be taken of the fact that an undertaking of the type envisaged is an association whose object is to protect the rights and interests of its individual members against, in particular, major exploiters and distributors of musical material, such as radio broadcasting bodies and record manufacturers.

<sup>1</sup> [1974] E.C.R. 313.

<sup>2</sup> On the meaning of a 'substantial part' of the Common Market, see also the remarks of Mr. Advocate-General Mayras, *ibid.*, p. 324.

<sup>3</sup> The omission of 'cannot' is obviously a misprint; cf. the French text (ils ne peuvent pratiquement éviter d'adhérer) and the original Dutch text (waarbij aansluiting voor hen praktisch onvermijdelijk is).

For an association effectively to protect its rights and interests it must enjoy a position based on the assignment in its favour, by the associated authors, of their rights to the extent required for the association to carry out its activity on the necessary scale.

Consequently, it is desirable to examine whether the practices in dispute exceed the limit absolutely necessary for the attainment of this object, with due regard also to the interest which the individual author may have that his freedom to dispose of his work is not limited more than need be.

For this purpose, a compulsory assignment of all copyrights, both present and future, no distinction being drawn between the different generally accepted types of exploitation, may appear an unfair condition, especially if such assignment is required for an extended period after the member's withdrawal.

The inequitable nature of such provisions must be determined by the relevant court, bearing in mind both the intrinsic individual effect of those clauses and their effect when combined.

If abusive practices are exposed, it is also for the court to decide whether and to what extent they affect the interests of authors or third parties concerned, with a view to deciding the consequences with regard to the validity and effect of the contracts in dispute or certain of their provisions.

It must be concluded that the fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of Article 86 imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright can constitute an abuse.<sup>1</sup>

The Brussels Tribunal's third question concerned the interpretation of Article 90 (2) of the Treaty, which provides that 'undertakings entrusted with the operation of services of general economic interest . . . shall be subject to the rules contained in this Treaty, in particular to the rules of competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'. SABAM argued that this provision applied to it, and that consequently the rules of competition should to some extent be relaxed in SABAM's favour. The Court of Justice did not share this opinion. Since Article 90 (2) allowed derogations from the rules of the Treaty, the undertakings which could benefit from Article 90 (2) must be narrowly defined. Private undertakings would be covered by Article 90 (2) only if they were entrusted with the operation of services of general economic interest by an act of the public authority; 'that is not the position in the case of an undertaking to which the State has not assigned any task and which manages private interests'. The fact that the copyrights managed by the copyright association were rights created and protected by law was not enough.

The Court therefore found it unnecessary to consider the Brussels Tribunal's fourth question, which asked whether Article 90 (2) created rights for private parties which national courts must safeguard.<sup>2</sup>

### *Patents and trade marks*

*Case No. 6. Centrafarm B.V. v. Sterling Drug Inc.*<sup>3</sup> Sterling Drug Inc., a New York company, held patents in several countries including the Netherlands, the United

<sup>1</sup> See also the Commission's decisions in the *GEMA* case, [1971] C.M.L.R. D35 and [1972] C.M.L.R. D115.

<sup>2</sup> Mr. Advocate-General Mayras recommended that this question should be answered in the negative: [1974] E.C.R. 327-8 (relying on *Ministère public luxembourgeois v. Hein (née Muller)*, *Recueil de la jurisprudence*, 17 (1971), p. 723, at p. 730). But see the *Sacchi* case, [1974] E.C.R. 409, 430.

<sup>3</sup> [1974] 2 C.M.L.R. 480; [1974] E.C.R. 1147 and 1183.

Kingdom and West Germany, covering the method of preparing a drug called acidum nalidixicum, used for treating infections of the urinary tract. Dutch, British and German trade marks for this drug, 'Negram', belonged respectively to the Dutch, British and German subsidiaries of Sterling Drug Inc. Consignments of the drug, bearing the trade mark 'Negram', which had been put on the market in the United Kingdom and West Germany by the British and German subsidiaries of Sterling Drug Inc., were imported into the Netherlands by the appellants without the consent of Sterling Drug Inc. Sterling Drug Inc. and its Dutch subsidiary, relying on their patent and trade mark respectively, sued the appellants in Dutch courts to restrain them from marketing the drug in the Netherlands. The Netherlands Supreme Court (Hoge Raad) sought a ruling from the Court of Justice of the European Communities under Article 177 of the E.E.C. Treaty on various questions of Community law.

The first question raised by the Hoge Raad read as follows:

Assuming that

1. a patentee has parallel patents in several of the countries belonging to the E.E.C.,
2. the products protected by those patents are lawfully marketed in one or more of those countries by undertakings to whom the patentee has granted licences to manufacture and/or sell,
3. those products are subsequently exported by third parties and are marketed and further dealt with in one of those other countries,
4. the patent legislation in the last-mentioned countries gives the patentee the right to take legal action to prevent products thus protected by patents from being there marketed by others, even where these products were previously lawfully marketed in another country by the patentee or by the patentee's licensee;

do the rules in the E.E.C. Treaty concerning the free movement of . . . goods . . . prevent the patentee from using the right under 4 above?

The Court of Justice of the European Communities gave the following answer:

The effect of the provisions of the Treaty on the free movement of goods, particularly Article 30, is to prohibit between member States measures restricting imports and all measures of equivalent effect.

By Article 36 these provisions do not, however, prevent prohibitions or restrictions on imports justified on grounds of protection of industrial and commercial property.

But it appears from that same Article, particularly from its second sentence,<sup>1</sup> as well as from the context, that, while the Treaty does not affect the existence of rights in industrial and commercial property recognized by the law of a member State, the exercise of such rights may nonetheless, according to circumstances, be affected by the prohibitions in the Treaty.

In so far as it makes an exception to one of the fundamental principles of the Common Market, Article 36 allows derogations to the free movement of goods only to the extent that such derogations are justified for the protection of the rights which constitute the specific object of such property.

As regards patents, the specific object of industrial property is inter alia to ensure to the holder, so as to recompense the creative effort of the inventor, the exclusive right to utilize an invention with a view to the manufacture and first putting into circulation of industrial products, either directly or by the grant of licences to third parties, as well as the right to oppose any infringement.

The existence, in national laws on industrial and commercial property, of provisions

<sup>1</sup> The second sentence of Article 36 reads as follows: 'Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member States.'



that the right of a patentee is not exhausted by the marketing in another member State of the patented product, so that the patentee may oppose the import into his own State of the product marketed in another State, may constitute an obstacle to the free movement of goods.

While such an obstacle to free movement may be justifiable for reasons of protection of industrial property when the protection is invoked against a product coming from a member State in which it is not patentable and has been manufactured by third parties without the consent of the patentee or where the original patentees are legally and economically independent of each other, the derogation to the principle of free movement of goods is not justified when the product has been lawfully put by the patentee himself, or with his consent, on the market of the member State from which it is being imported, e.g. in the case of a holder of parallel patents.

If a patentee could forbid the import of protected products which had been marketed in another member State by him or with his consent he would be enabled to partition the national markets and thus to maintain a restriction on the trade between the member States without such a restriction being necessary for him to enjoy the substance of the exclusive rights deriving from the parallel patents.

The plaintiff has argued . . . that because of the variations between the national laws and practices there are no truly identical or parallel patents.

On that it should be noted that in spite of the variations in the national rules on industrial property resulting from lack of unification, the essential element for the judge to decide in the notion of parallel patents is the identity of the protected invention.

The question should therefore be answered to the effect that the exercise by a patentee of the right given him by the laws of a member State to prohibit the marketing in that State of a product protected by the patent and put on the market in another member State by such patentee or with his consent would be incompatible with the rules of the E.E.C. Treaty relating to the free movement of goods in the Common Market.

The Court gave a similar ruling concerning trade marks.

It is possible that a similar rule would apply even if the holder of a patent or trade mark in one member State had not consented to the marketing of the goods in another member State, provided that the patents or trade marks in both member States had originally belonged to the same person. This happened in *van Zuylen Frères v. Hag A.G.*,<sup>1</sup> where the Belgian and Luxembourg trade marks belonging to the German defendant had been seized as enemy property in 1944. The Court of Justice of the European Communities held that the Community rules concerning free movement of goods prohibited the holder of a trade mark in one member State from preventing the importation of goods which lawfully bore the same trade mark in another member State, if at the outset the two marks had belonged to the same holder. The judgment in the *van Zuylen* case, unlike the judgment in the *Centrafarm* case, deals only with trade marks<sup>2</sup> and not with patents, so it is uncertain whether the principles laid down in the *van Zuylen* case apply to other types of industrial and commercial property, such as patents and copyrights. There may be some significance in the fact that the Court pointed out in the *van Zuylen* case that 'the exercise of a trade mark right . . . —unlike other forms

<sup>1</sup> [1974] E.C.R. 731.

<sup>2</sup> The judgment in the *van Zuylen* case contains an interesting passage about the function of a trade mark: 'Whilst . . . the indication of origin of a product covered by a trade mark is useful, information to consumers on this point may be ensured by means other than such as would affect the free movement of goods.' It is submitted that such means would include labels stating the name of the manufacturer or the country of manufacture. But there is no obligation to attach such labels, despite the suggestion of Mr. Advocate-General Mayras to the contrary; the Court said that 'information . . . may be ensured' by other means, not that information *must* be ensured. ([1974] E.C.R. 744 (paragraph 14) and 754.)

of industrial and commercial property—is not subject to limitations in point of time'.<sup>1</sup> Moreover, there are *dicta* in the earlier case of *Sirena v. Eda* to the effect that trade marks are not as worthy of protection as patents.<sup>2</sup> On the other hand, Article 36 of the E.E.C. Treaty does not distinguish between different forms of industrial and commercial property, and the fact that the Court considered in the *Centrafarm* case that patents and trade marks were governed by identical rules lends support to the view that the principles laid down in the *van Zuylen* case concerning trade marks are equally applicable to patents.

In the *Centrafarm* case the Court went on to say that its answer to the Hoge Raad's first question was not affected by the fact that the patentee (or trade mark holder) and his licensees belonged (or did not belong) to the same group of companies.

A further problem in the *Centrafarm* case arose from the fact that the price of the drug in the United Kingdom was much lower than in other member States as a result of price controls imposed by the British government. The Court held that this fact did not authorize the holders of the Dutch patent or trade mark to use the patent or trade mark to prevent imports of the drug from the United Kingdom into the Netherlands: if price controls imposed by a member State caused distortion of competition between member States, it was for the Community authorities to take the appropriate remedies, . . . e.g., by the harmonization of national measures for the control of prices and by the prohibition of aids incompatible with the Common Market, as well as by the exercise of their powers in competition matters.

The existence of such factors in a member State, however, could not justify the maintenance or the introduction by another member State of measures incompatible with the rules on the free movement of goods, *inter alia* relating to industrial and commercial property.

The Hoge Raad also asked

. . . whether a patentee [or trade mark holder], in order to be able to control the distribution of a pharmaceutical product with a view to the protection of the public against risks from defective products, is authorized to exercise the rights conferred on him by the patent [or trade mark] notwithstanding the Community rules on the free movement of goods.

The Court held that the protection of the public against defective products was the task of national authorities, and not of holders of patents or trade marks.

The protection of the public against the risks from defective products is a legitimate concern, and therefore Article 36 of the Treaty authorizes the member States to derogate from the rules on the free movement of goods for reasons of protection of health and life of humans and animals.

However, the measures necessary to that end should be taken as part of the field of public health control and not by way of a misuse of the rules on industrial and commercial property.

The Hoge Raad also asked

. . . whether Article 42 of the Act of Accession of the three new member States implies that the rules of the Treaty on the free movement of goods cannot be invoked in Holland before 1 January 1975 in so far as the goods in question come from the United Kingdom.

The Court answered this question in the negative.

<sup>1</sup> [1974] E.C.R. 744, paragraph 11.

<sup>2</sup> *Recueil de la jurisprudence*, 17 (1971), pp. 82 and 87-8; [1971] C.M.L.R. 264-5 and 273.

Article 42 of the Act of Accession provides in paragraph 1 that quantitative restrictions on imports and exports between the Community as originally constituted and the new member States shall be abolished from the date of accession.

Under paragraph 2 of the same Article . . . 'measures having equivalent effect to such restrictions shall be abolished by 1 January 1975 at the latest'.

In its context this provision can apply only to those measures of equivalent effect to quantitative restrictions which, as between the original six member States, had to be abolished by the end of a transitional period under Articles 30 and 32 to 35 of the E.E.C. Treaty.

It follows therefore that Article 42 of the Act of Accession has no effect on the import prohibitions resulting from national law on industrial and commercial property.

Such matter is therefore subject to the principle embedded in the Treaty and in the Act of Accession that the provisions of the Treaties instituting the European Communities regarding free movement of goods, particularly Article 30, are applicable to the new member States as from the date of accession unless expressly provided otherwise.

It follows that Article 42 of the Act of Accession could not be invoked to hinder the import into Holland, even before 1 January 1975, of goods put on the United Kingdom market . . .

Finally, the Hoge Raad asked two questions concerning the effect of Article 85 of the E.E.C. Treaty. The Court of Justice of the European Communities summarized these questions and replied to them in the following words:

By these questions the Court is asked to say whether Article 85 of the E.E.C. Treaty is applicable to agreements and concerted practices between the holder of parallel patents in different member States and his licensees, if the totality of the agreements and concerted practices has the aim of regulating differently according to country the market conditions for goods protected by the patents.

While the industrial property rights recognized by the law of a member State are not affected in their existence by Article 85 of the Treaty, the way in which they are exercised may be covered by the prohibitions set out in that Article.

That may be so whenever the exercise of such a right appears as the object, means or consequence of an agreement [restricting competition].

Article 85, however, does not apply to agreements or concerted practices between undertakings belonging to the same group in the form of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary does not have real autonomy in determining its line of conduct on the market and if the agreements or practices have the aim of establishing an internal distribution of tasks between the undertakings.

This ruling—which was accompanied by a similar ruling concerning trade marks—merely repeats principles which the Court had laid down in previous cases.<sup>1</sup>

### *Discrimination on grounds of nationality—right of establishment—legal profession*

*Case No. 7. Reyners v. Belgian State.*<sup>2</sup> Under Belgian law as it existed before 1970, only Belgian nationals were entitled to become *avocats*. In 1970 a Royal Decree extended the right to foreigners who could prove, *inter alia*, that Belgian nationals were entitled to become *avocats* in the foreign country concerned. The plaintiff was a Dutch national who did not fulfil the requirements of nationality or reciprocity for admission to the Belgian bar, although he was qualified in all other respects, having lived for many years in Belgium and having obtained a Belgian law degree. He asked the Belgian Conseil d'Etat to annul the Royal Decree of 1970 on the grounds that it was contrary

<sup>1</sup> See this *Year Book*, 46 (1972-3), pp. 459 and 461.

<sup>2</sup> [1974] E.C.R. 631.



to the E.E.C. Treaty, and the Belgian Conseil d'État asked the Court of Justice of the European Communities to give a preliminary ruling on various articles of the Treaty.

The main question concerned the direct applicability or otherwise of Article 52 of the E.E.C. Treaty, which provides:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a member State in the territory of another member State shall be abolished by progressive stages in the course of the transitional period . . .

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons . . . under the conditions laid down by the law of the country where such establishment is effected . . .

The Belgian and Irish governments, which intervened in the proceedings before the Court, emphasized the words 'within the framework of the provisions set out below'<sup>1</sup> and argued that Article 52 conferred no rights on individuals until it was implemented by directives issued under Articles 54 and 57; and no such directives applicable to the legal profession had been issued. A similar view was taken by the British and Luxembourg governments and by the *Ordre national des avocats de Belgique*. A different view was taken by the plaintiff, by the German and Dutch governments and by the Commission.

The plaintiff . . . states that all that is in question in his case is a discrimination based on nationality by reason of the fact that he is subject to conditions of admission to the profession of *avocat* which are not applicable to Belgian nationals.

In this respect (he submits) Article 52 is a clear and complete provision, capable of producing a direct effect.

The German government, supported in substance by the Dutch government . . ., considers that the provisions which impose on member States an obligation which they have to fulfil within a particular period become directly applicable when, on the expiration of that period, the obligation has not been fulfilled.

At the end of the transitional period, the member States no longer have the possibility of maintaining restrictions on the freedom of establishment, since Article 52 has, as from this period, the character of a provision which is complete in itself and legally perfect.

In these circumstances . . . the directives provided for by Article 54 were of significance only during the transitional period, since the freedom of establishment was fully attained at the end of it.

The Commission, in spite of doubts which it experiences on the subject of the direct effect of the provision to be interpreted—both in view of the reference by the Treaty . . . to the implementing directives and by reason of the tenor of certain liberalizing directives already taken, which do not attain in every respect perfect equality of treatment—considers, however, that Article 52 has at least a partial direct effect in so far as it specifically prohibits discrimination on grounds of nationality.

The Court agreed with the German government.

<sup>1</sup> They probably read too much into these words. As Mr. Advocate-General Mayras said (*ibid.*, p. 662):

It may be observed that the wording with which Article 52 commences: 'Within the framework of the provisions set out below . . .', has no aim other than that of referring to the procedure by which the progressive abolition of restrictions should in general take place. It certainly does not have the effect either of legally subjecting this elimination to the issue of the directives provided for in Article 54 or of thwarting the time limit which the draftsmen of the Treaty have clearly and in a binding way established for its attainment.

Moreover, when they decided otherwise, they said so expressly. This is the case in particular with the medical and allied, and the pharmaceutical professions, for whom under Article 57 (3) 'the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various member States'.

Article 7 of the Treaty, which forms part of the 'principles' of the Community, provides that within the scope of application of the Treaty and without prejudice to any special provisions contained therein, 'any discrimination on grounds of nationality shall be prohibited'.

Article 52 provides for the implementation of this general provision in the special sphere of the right of establishment.

...  
For the purpose of achieving this objective by progressive stages during the transitional period Article 54 provides for the drawing up by the Council of a 'general programme' and, for the implementation of this programme, directives intended to attain freedom of establishment in respect of the various activities in question.

Besides these liberalizing measures, Article 57 provides for directives intended to ensure mutual recognition of diplomas, certificates and other evidence of formal qualifications and in a general way for the coordination of laws with regard to establishment and the pursuit of activities as self-employed persons.

It appears from the above that in the system of the chapter on the right of establishment the 'general programme' and the directives provided for by the Treaty are intended to accomplish two functions, the first being to eliminate obstacles in the way of attaining freedom of establishment during the transitional period, the second being to introduce into the law of member States a set of provisions intended to facilitate the effective exercise of this freedom for the purpose of assisting economic and social interpenetration within the Community in the sphere of activities as self-employed persons.

This second objective is the one referred to, first, by certain provisions of Article 54 (3), relating in particular to cooperation between the competent authorities in the member States and adjustment of administrative procedures and practices, and, secondly, by the set of provisions in Article 57.

The effect of the provisions of Article 52 must be decided within the framework of this system.

The rule on equal treatment with nationals is one of the fundamental legal provisions of the Community.

As a reference to a set of legislative provisions effectively applied by the country of establishment to its own nationals, this rule is, by its essence, capable of being directly invoked by nationals of all the other member States.

In laying down that freedom of establishment shall be attained at the end of the transitional period, Article 52 thus imposes an obligation to attain a precise result, the fulfilment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures.

The fact that this programme has not been adhered to leaves the obligation itself intact beyond the end of the period provided for its fulfilment.

This interpretation is in accordance with Article 8 (7) of the Treaty, according to which the expiry of the transitional period shall constitute the latest date by which all the rules laid down must enter into force and all the measures required for establishing the common market must be implemented.

It is not possible to invoke against such an effect the fact that the Council has failed to issue the directives provided for by Articles 54 and 57 or the fact that certain of the directives actually issued have not fully attained the objective of non-discrimination required by Article 52.

After the expiry of the transitional period the directives provided for by the Chapter on the right of establishment have become superfluous with regard to implementing the rule on nationality, since this is henceforth sanctioned by the Treaty itself with direct effect.

These directives have however not lost all interest since they preserve an important scope [un champ d'application important] in the field of measures intended to make easier the effective exercise of the right of freedom of establishment.

It is right therefore to reply to the question raised that, since the end of the transitional period, Article 52 of the Treaty is a directly applicable provision despite the absence in a particular sphere of the directives prescribed by Articles 54 (2) and 57 (1) of the Treaty.<sup>1</sup>

Despite the apparent boldness of the Court's interpretation, it should be noted that only discrimination on grounds of *nationality* is prohibited. Thus it would be perfectly lawful for Belgium to refuse access to the legal profession to persons who did not possess a Belgian law degree (pending the issue of directives for the mutual recognition of qualifications under Article 57 (1)) or an adequate knowledge of French or Flemish. On the other hand, a requirement that entrants into the profession must have previously resided for a certain time in Belgium is of dubious legality, especially if the period of time required is a long one, because such a requirement has little or nothing to do with a candidate's ability to do his job properly (and in this respect it differs from requirements relating to knowledge of Belgian law or linguistic abilities); rather, it would appear to be a means of trying to evade the prohibition against discrimination on grounds of nationality.<sup>2</sup>

The other question put to the Court by the Belgian Conseil d'État concerned the interpretation of the first paragraph of Article 55 of the Treaty, which provides:

The provisions of this Chapter shall not apply, so far as any given member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.

The Court said:

The Conseil d'État has also requested a definition of what is meant in the first paragraph of Article 55 by 'activities which in that State are connected, even occasionally, with the exercise of official authority'.

More precisely, the question is whether, within a profession such as that of *avocat*, only those activities inherent in this profession which are connected with the exercise of official authority are excepted from the application of the Chapter on the right of establishment, or whether the whole of this profession is excepted by reason of the fact that it comprises [*inter alia*] activities connected with the exercise of this authority.

The Court held that the first paragraph of Article 55, being an exception to Article 52 and the other rules about the right of establishment, 'cannot be given a scope which would exceed the objective for which this exemption clause was inserted'. The Court went on:

This [objective] is fully satisfied when the exclusion of [foreign] nationals is limited to those activities which, taken on their own, constitute a direct and specific connexion with the exercise of official authority.

An extension of the exception allowed by Article 55 to a whole profession would be possible only in cases where such activities were linked with that profession in such a way that freedom of establishment would result in imposing on the member State concerned the obligation to allow the exercise, even occasionally, by non-nationals of functions appertaining to official authority.

This extension is . . . not possible when, within the framework of an independent profession, the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole.

<sup>1</sup> See also the discussion by Mr. Advocate-General Mayras of the tests to be applied in order to determine whether a provision of the Treaty is directly applicable: *ibid.*, pp. 659-63.

The transitional period expired at the end of 1969. Articles 48-66 of the Treaty became fully applicable to the new member States at the beginning of 1973, with no provision for a new transitional period.

<sup>2</sup> Cf. *Sotgiu v. Deutsche Bundespost*, [1974] E.C.R. 153, 164.



The functions of the legal profession varied somewhat from State to State, but the Court nevertheless found it possible to lay down some general guidelines.

The most typical activities of the profession of *avocat*, in particular, such as consultation and legal assistance and also representation and the defence of parties in court, even when the intervention or assistance of the *avocat* is compulsory or is a legal monopoly, cannot be considered as connected with the exercise of official authority.

The exercise of these activities leaves the discretion of judicial authority and the free exercise of judicial power intact.

It is therefore right to reply to the question raised that the exception to freedom of establishment provided for by the first paragraph of Article 55 must be restricted to those of the activities referred to in Article 52 which in themselves involve a direct and specific connexion with the exercise of official authority.

Although the Court did not give any examples of activities which would be covered by the exception to the right of establishment provided for by the first paragraph of Article 55, it is obvious that they would include part-time judicial activities exercised by a barrister.<sup>1</sup>

A few months later the Court was confronted with similar problems in the *van Binsbergen* case,<sup>2</sup> which concerned a Dutch national living in Belgium who wished to appear as legal representative for the plaintiff before a Dutch social security tribunal. Dutch law gave a right of audience only to persons living in the Netherlands. He argued that this provision was contrary to the first paragraph of Article 59 and the third paragraph of Article 60 of the E.E.C. Treaty.<sup>3</sup>

The Court of Justice of the European Communities held that these provisions of the treaty had been directly applicable since the end of the transitional period, at least as far as discrimination based on nationality or residence was concerned, notwithstanding the failure of the Council to issue some of the directives intended to implement those provisions. The Court's reasoning on this point was much the same as its reasoning concerning the direct applicability of Article 52 in the *Reyners* case.

A national of one State, who is established, and carries on a profession, in another State, is subject to the law of the latter State concerning the conduct of the profession. However, if he is established in one State and provides professional services in another State for clients living in that other State, there is a possibility that he will escape regulation by the law of the latter State. This possibility presents dangers for his clients and for the public generally. Consequently the Court of Justice of the European Communities interpreted Article 59 as not preventing a State imposing restrictions in certain circumstances on persons who lived in another State and provided services in the first State:

. . . taking into account the particular nature of the services to be provided, specific

<sup>1</sup> See also the submissions of Mr. Advocate-General Mayras, *ibid.*, pp. 667-8.

<sup>2</sup> [1974] E.C.R. 1299.

<sup>3</sup> The first paragraph of Article 59 provides:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of member States who are established in a State of the Community other than that of the person for whom the services are intended.

The third paragraph of Article 60 provides:

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

requirements imposed on the person providing the service cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules justified by the general good—in particular rules relating to organization, qualifications, professional ethics, supervision and liability—which are binding upon any person established in the State in which the service is provided, where the person providing the service would escape from the ambit of those rules [by] being established in another member State.

Likewise, a member State cannot be denied the right to take measures to prevent the exercise, by a person providing services whose activity is entirely or principally directed towards its territory, of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State; such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services.

In accordance with these principles, the requirement that persons whose functions are to assist the administration of justice must be permanently established for professional purposes within the jurisdiction of certain courts or tribunals cannot be considered incompatible with the provisions of Articles 59 and 60, where such requirement is objectively justified by the need to ensure observance of professional rules of conduct connected, in particular, with the administration of justice and with respect for professional ethics.

That cannot, however, be the case when the provision of certain services in a member State is not subject to any sort of qualification or professional regulation<sup>1</sup> and when the requirement of habitual residence is fixed by reference to the territory of the State in question.

In relation to a professional activity the exercise of which is similarly unrestricted within the territory of a particular member State, the requirement of residence within that State constitutes a restriction which is incompatible with Articles 59 and 60 of the Treaty if the administration of justice can satisfactorily be ensured by measures which are less restrictive, such as the choosing of an address for service.

It must therefore be stated in reply to the question put to the Court that the first paragraph of Article 59 and the third paragraph of Article 60 of the E.E.C. Treaty must be interpreted as meaning that the national law of a member State cannot, by imposing a requirement as to habitual residence within that State, deny persons established in another member State the right to provide services, where the provision of services is not subject to any special condition under the national law applicable.

*Discrimination on grounds of nationality—free movement of labour and of services—extra-territorial application of laws*

*Case No. 8. Walrave and another v. Union Cycliste Internationale and others.*<sup>2</sup> The plaintiffs were professional pacemakers, i.e. they earned their living by riding on motor-bicycles in front of pedal cyclists ('stayers') in motor-paced bicycle races, thus creating a moving vacuum in which the pedal cyclists were able to reach higher speeds than pedal cyclists were normally able to reach. They brought an action in a Dutch court, seeking a declaration that a rule adopted by the first defendant to govern future world championships, requiring the pacemaker to be of the same nationality as the stayer, was contrary to rules of Community law prohibiting discrimination on grounds

<sup>1</sup> In the *van Binsbergen* case the plaintiff's legal representative was not an *advocaat* but a 'legal adviser'. In the Netherlands the profession of legal adviser (unlike the profession of *advocaat*) is not subject to any sort of qualification or professional regulation. *Advocaten* have a monopoly of the right of audience before certain courts, but not before social security tribunals.

<sup>2</sup> [1974] E.C.R. 1405.



of nationality. The Dutch court referred various questions of Community law to the Court of Justice of the European Communities under Article 177 of the E.E.C. Treaty.

The first problem was whether Community law applied to sporting activities at all. The Court held that it did, but only in so far as they constituted economic activities (which presumably means remunerated activities, including activities of a casual or part-time nature,<sup>1</sup> although the Court did not define economic activities). Consequently rules of Community law prohibiting discrimination on grounds of nationality applied to sporting activities if they were economic activities. But the Court went on to lay down an exception.

This prohibition however does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity.

This restriction on the scope of the provisions in question must however remain limited to its proper objective.

Having regard to the above, it is for the national court to determine the nature of the activity submitted to its judgment and to decide in particular whether in the sport in question the pacemaker and stayer do or do not constitute a team.<sup>2</sup>

Despite some ambiguities, the Court here seems to be saying that the prohibition of discrimination on grounds of nationality does not apply to the formation of national teams, *even if the teams are paid*. If the Court had intended to confine its remarks to the formation of *unpaid* national teams, it would hardly have described its ruling as a '*restriction* on the scope of the provisions in question', because the Court had already held that Community law did not apply at all to unpaid sporting activities.

It was uncertain whether the plaintiffs were employed under a contract of service or a contract for services. In the case of contracts of service, Article 48 (2) of the E.E.C. Treaty prohibited discrimination on grounds of nationality,<sup>3</sup> and all the parties were agreed that this prohibition applied not only to public authorities, but also to private bodies. But the defendants suggested that Article 59, which applied to contracts for services, prohibited only restrictions imposed by public authorities. The Court rejected this distinction between Articles 48 and 59.

Articles 7, 48 [and] 59 have in common the prohibition, in their respective spheres of application, of any discrimination on grounds of nationality.

Prohibition of such discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.

The abolition as between member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community contained in Article 3 (c) of the Treaty, would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law.

<sup>1</sup> Despite the decision of a London magistrate to the contrary in *R. v. Secchi*, [1975] 1 C.M.L.R. 383.

<sup>2</sup> One of the main points in dispute was whether the pacemaker and stayer constituted a team, or whether the stayer was the real competitor, with the pacemaker assuming a purely ancillary role, like a second in a boxing match. But this was a question of fact, and, as such, fell to be decided by the Dutch court and not by the Court of Justice of the European Communities.

<sup>3</sup> Article 48 (2) had been implemented by Regulation 1612/68, and the Court had therefore no difficulty in holding in *Commission v. French Republic*, [1974] E.C.R. 359, 371, that 'the provisions of Article 48 and of Regulation 1612/68 are directly applicable in the legal system of every member State'.



Since, moreover, working conditions in the various member States are governed sometimes by means of provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons, to limit the prohibitions in question to acts of a public authority would risk creating inequality in their application.

Although the third paragraph of Article 60, and Articles 62 and 64, specifically relate, as regards the provision of services, to the abolition of measures by the State, this fact does not defeat the general nature of the terms of Article 59, which makes no distinction between the source of the restrictions to be abolished.

It is established, moreover, that Article 48, relating to the abolition of any discrimination based on nationality as regards gainful employment, extends likewise to agreements and rules which do not emanate from public authorities.

...  
The activities referred to in Article 59 are not to be distinguished by their nature from those in Article 48, but only by the fact that they are performed outside the ties of a contract of employment.

This single distinction cannot justify a more restrictive interpretation of the scope of the freedom to be ensured.

It follows that the provisions of Articles 7, 48 and 59 of the Treaty may be taken into account by the national court in judging the validity or the effects of a provision inserted in the rules of a sporting organization.

Finally, the Court repeated its ruling in the *van Binsbergen* case<sup>1</sup> that Article 59 had been directly applicable within the legal systems of the member States since the end of the transitional period, at least as far as discrimination based on nationality was concerned.

The Dutch court also asked the Court of Justice of the European Communities to interpret Article 7 of the E.E.C. Treaty, which provides:

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council may, on a proposal from the Commission and after consulting the Assembly, adopt, by a qualified majority, rules designed to prohibit such discrimination.

The Court, apparently considering that its interpretation of Articles 48 and 59 was sufficient to enable the Dutch court to decide the case, refrained from interpreting Article 7. Article 7 has frequently been used to condemn discrimination by public authorities, but it has not yet been applied to private bodies. Applying by analogy the Court's ruling on Articles 48 and 59, there seems to be no reason why Article 7 should not apply to discrimination by private bodies. On the other hand, Article 7 is probably not directly applicable within the legal systems of the member States. Like Articles 48-51 and 59-66, Article 7 empowers the Council to adopt implementing acts, but, unlike Articles 48-51 and 59-66, it lays down no time limit for the adoption of such acts. Articles 48 and 59, according to the Court, became self-executing on the expiry of the time limit; since there is no time limit for the implementation of Article 7, it would seem to follow that Article 7 can never be self-executing.

The Court also considered the problem of the applicability of Community law to the activities of a sporting federation of world-wide proportions, whose members included sporting associations from many non-member States of the E.E.C. As Mr. Advocate-General Warner pointed out, the true issue was not whether Community law could annul the rules of an international sporting federation, but whether Community law

<sup>1</sup> See above, p. 430.

could prohibit the application of those rules on the territory of the Community. The Court's answer to this issue is not altogether satisfactory.

By reason of the fact that it is imperative, the rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community.

It is for the national judge to decide whether they can be so located, having regard to the facts of each particular case . . .

To base the application of Community law on the fact that an agreement is made inside the Community (but performed outside) is probably authorized by the subjective territorial principle,<sup>1</sup> but is not very desirable. In any case, well-advised parties can easily evade this rule by making their agreements outside the Community.

More worrying is the Court's reference to 'the place where they take effect'. If this means the place where a sporting competition takes place, there is no problem; but if that is what the Court meant, why did it not say so, instead of using a vaguer formula? The Dutch court and the Advocate-General had suggested that Community law could apply even to competitions held outside the Community, if the defendant's rule requiring the pacemaker to have the same nationality as the stayer in world championships had the effect of influencing the choice of pacemakers for preliminary heats within the Community (even though the defendant's rules did not apply to preliminary heats, there was a likelihood that a stayer would not select a pacemaker of another nationality for preliminary heats if he knew that he would not be able to use the same pacemaker in the world championship). The Court's formula does not reject this argument, and may even be interpreted as endorsing it. If so, there is a possibility of a conflict between Community law and international law, because the effects felt within the Community are, it is submitted, too indirect to authorize the exercise of Community jurisdiction.<sup>2</sup>

### *Free movement of labour—exclusion based on public policy*

*Case No. 9. Van Duyn v. Home Office.*<sup>3</sup> In 1968 the British Minister of Health announced in the House of Commons that the Government considered Scientology to be socially harmful and that foreign nationals would not be permitted to work for the Church of Scientology in the United Kingdom. Accordingly, when Miss van Duyn, a Dutch national who had worked for the Church of Scientology in the Netherlands, arrived in England in 1973 to work for a Scientology establishment in England, she was refused leave to enter. She sought a declaration in the High Court that that refusal was contrary to Article 48 of the E.E.C. Treaty and to Article 3 of Directive 64/221.<sup>4</sup> The High Court referred the case to the Court of Justice of the European Communities under Article 177 of the E.E.C. Treaty.

<sup>1</sup> But see this *Year Book*, 46 (1972-3), pp. 145, 193, n. 2.

<sup>2</sup> *Ibid.*, pp. 154-6 and 198 et seq. However, it is submitted that no breach of international law will be committed if the relevant Community rules merely form part of the civil law of member States and are not enforced by sanctions of a criminal or quasi-criminal nature: *ibid.*, pp. 179-90. Even criminal sanctions would not violate international law if they were directed solely against Community nationals, since international law allows States to exercise criminal jurisdiction on the nationality principle (with some exceptions: *ibid.*, pp. 188-90).

<sup>3</sup> [1974] E.C.R. 1337. This was the first judgment given by the Court in response to a request from a British court under Article 177 of the E.E.C. Treaty.

<sup>4</sup> Article 48 lays down the principle of free movement of workers, 'subject to limitations justified on grounds of public policy [*ordre public*], public security or public health'. Article 3 (1)

The High Court's first question asked whether Article 48 of the E.E.C. Treaty was 'directly applicable so as to confer on individuals rights enforceable by them in the courts of a member State'. The Court of Justice of the European Communities answered this question in the affirmative.

It is provided, in Article 48 (1) and (2), that freedom of movement for workers shall be secured by the end of the transitional period and that such freedom shall entail 'the abolition of any discrimination based on nationality between workers of member States as regards employment, remuneration and other conditions of work and employment'.

These provisions impose on member States a precise obligation which does not require the adoption of any further measure on the part either of the Community institutions or of the member States and which leaves them, in relation to its implementation, no discretionary power.<sup>1</sup>

Paragraph 3, which defines the rights implied by the principle of freedom of movement for workers, subjects them to limitations justified on grounds of public policy, public security or public health. The application of these limitations is, however, subject to judicial control, so that a member State's right to invoke the limitations does not prevent the provisions of Article 48, which enshrine the principle of freedom of movement for workers, from conferring on individuals rights which are enforceable by them and which the national courts must protect.

The second question asked whether Directive 64/221 was directly applicable. The Court of Justice of the European Communities limited its answer to Article 3 (1) of the Directive, which was the only provision of the Directive relevant to the case, and held that Article 3 (1) was directly applicable.

The United Kingdom observes that, since Article 189 of the Treaty distinguishes between the effects ascribed to regulations, directives and decisions, it must therefore be presumed that the Council, in issuing a directive rather than making a regulation, must have intended that the directive should have an effect other than that of a regulation and accordingly that the former should not be directly applicable.

If, however, by virtue of the provisions of Article 189 regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that Article can never have similar effects. It would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from taking it into consideration as an element of Community law. Article 177, which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts. It is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between member States and individuals.

By providing that measures taken on grounds of public policy shall be based exclusively on the personal conduct of the individual concerned, Article 3 (1) of Directive No. 64/221 is intended to limit the discretionary power which national laws generally confer

of the Directive provides: 'Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned.'

<sup>1</sup> But the Court held later that member States had 'an area of discretion within the limits imposed by the Treaty' when applying the limitation based on public policy; see below, p. 437.



on the authorities responsible for the entry and expulsion of foreign nationals. First, the provision lays down an obligation which is not subject to any exception or condition and which, by its very nature, does not require the intervention of any act on the part either of the institutions of the Community or of member States. Secondly, because member States are thereby obliged, in implementing a clause which derogates from one of the fundamental principles of the Treaty in favour of individuals, not to take account of factors extraneous to personal conduct, legal certainty for the persons concerned requires that they should be able to rely on this obligation even though it has been laid down in a legislative act which has no automatic direct effect in its entirety.

In most circumstances directives are not directly applicable. But the position is different when directives impose clear and precise obligations on member States, which are not subject to any exception or condition, or to the adoption of subsequent acts on the part either of the Community authorities or of member States. Such directives are regulations in all but name, and it would be unduly formalistic to allow a mere difference of nomenclature to produce a difference in legal effects. Moreover, it is clear from the *van Duyn* case that one provision of a directive may be directly applicable even when other provisions are not.

In the third question the Court was asked to rule whether Article 48 of the Treaty and Article 3 (1) of Directive 64/221 must be interpreted to mean that

... a member State, in the performance of its duty to base a measure taken on grounds of public policy exclusively on the personal conduct of the individual concerned is entitled to take into account as matters of personal conduct:

(a) the fact that the individual is or has been associated with some body or organization the activities of which the member State considers contrary to the public good but which are not unlawful in that State;

(b) the fact that the individual intends to take employment in the member State with such a body or organization, it being the case that no restrictions are placed upon nationals of the member State who wish to take similar employment with such a body or organization.

As Mr. Advocate-General Mayras pointed out, the purpose of Article 3 (1) was to prohibit member States from taking *collective* measures against nationals of other member States (e.g. collective measures for the purposes of economic protection); Article 3 (1) required that an examination be made of the particular circumstances of each individual.<sup>1</sup> The Court nevertheless ruled as follows:

Although a person's past association cannot in general justify a decision refusing him the right to move freely within the Community, it is nevertheless the case that present association, which reflects participation in the activities of the body or of the organization as well as identification with its aims and its designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct within the meaning of the provision cited.

The Court held that it made no difference that the activities of the organization in question were not prohibited by the law of the State concerned.

It should be emphasized that the concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be unilaterally determined by each member State without being

<sup>1</sup> Consequently Article 3 forbids deportation for criminal offences if the object of the deportation is to deter *other* individuals from committing similar offences: *Bonsignore v. Cologne*, [1975] E.C.R. 297.

subject to control by the institutions of the Community. Nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty.

It follows from the above that where the competent authorities of a member State have clearly defined their standpoint as regards the activities of a particular organization and where, considering it to be socially harmful, they have taken administrative measures to counteract these activities, the member State cannot be required, before it can rely on the concept of public policy, to make such activities unlawful, if recourse to such a measure is not thought appropriate in the circumstances.

Finally, the Court considered the question 'whether a member State is entitled, on grounds of public policy, to prevent a national of another member State from taking gainful employment within its territory with a body or organization, it being the case that no similar restriction is placed upon its own nationals'. The Court answered this question in the affirmative. This answer appears to discriminate against nationals of other member States, but such discrimination is inherent in the Treaty:

... it is a principle of international law, which the E.E.C. Treaty cannot be assumed to disregard in the relations between member States, that a State is precluded from refusing its own nationals the right of entry or residence.<sup>1</sup>

However, Article 48 of the Treaty did permit a member State to refuse the right of entry or residence to nationals of other member States on grounds of public policy, public security or public health.

It follows that a member State, for reasons of public policy, can, where it deems necessary, refuse a national of another member State the benefit of the principle of freedom of movement for workers in a case where such a national proposes to take up a particular offer of employment even though the member State does not place a similar restriction upon its own nationals.

MICHAEL AKEHURST

<sup>1</sup> But it is submitted that the duty of the State is owed, not to its nationals, but to other States which do not wish nationals of the first State to reside on their territory.





## REVIEWS OF BOOKS

*La Belgique et le droit de la mer. Actes du Colloque conjoint dès 21 et 22 avril 1967.* Brussels: Éditions de l'Institut de Sociologie, 1969. 184 pp. Bfr. 270.

This publication of the Centre de droit international de l'Institut de Sociologie de l'Université de Bruxelles et de l'Université de Louvain, No. 3, covers in detail four questions of the law of the sea and shipping. The first concerns Belgian law relating to the nationality of ships and its connection with international law, the second an analysis of the London Fisheries Convention of 9 March 1964, by MM. Van der Mensbrugghe and De Schutter, the third the experience of Belgium in policing fishery laws from the Convention of 1882 to 1964 by M. De Breucker and the fourth the exercise of police powers in the high seas under treaties by M. De Pauw, which covers the Anti-Slavery treaties, the Submarine Telegraph Convention and the convention concerning the liquor traffic among fishermen in the North Sea. This is a useful symposium of interest to internationalists who are concerned with the implementation of maritime law in municipal systems.

D. P. O'CONNELL

*Le contrat économique international. Stabilité et Évolution.* Brussels, Établissements Émile Bruylant, and Paris, Éditions A. Pedone, 1975. x+586 pp. Bfr. 1,800.

In November 1973 the *Centre Charles De Visscher* organized at the University of Louvain-la Neuve the seventh *Journées d'études juridiques Jean Dabin*. The subject was *le contrat économique international*. The result is the present work. It comprises fifteen contributions, apart from a Preface by Professor Réczei, the Hungarian Ambassador to Belgium, and from an Introduction by Professor Rigaux, who seems to have been in charge and in all the articles included in this volume adopts a refreshingly realistic and sane approach. This pervades, in particular, his report on the sphere of application of the Uniform Law on International Sales; he sees very clearly that 'la prétendue éviction' of the conflict rules by that law rests on a misunderstanding, that by choice of law its control may be excluded 'même tacitement' (p. 91) and that, therefore, in most cases a decision on the law governing the contract cannot be avoided. In other words, contrary to the views put forward by some enthusiasts, the Uniform Law is far from rendering the conflict rules unnecessary.

The *contrat économique international* to which the present work is devoted is another of those comprehensive terms of doubtful usefulness which seem to be fashionable, are harmless if they are understood in a purely descriptive sense, yet are liable to mislead if legal precision is attached to them. Development contracts, investment contracts, transnational contracts and similar expressions are no more than new names for old facts and phenomena. The almost inevitable consequence flowing from the discussion of so vague a subject is that within the cover of the present work one finds a large variety of matters discussed. An interesting chapter on the conception of the international economic contract is followed by a first part, of four chapters respectively dealing with the E.E.C. draft Convention on the conflict of laws relating to obligations; the Uniform Law on International Sales already referred to; contracts between States and aliens; and the law applicable to international contracts according to the practice of arbitral tribunals. The second part includes a discussion by Professor Kahn of the 'lex mercatoria' in French practice and of legal problems in the economic field in Luxembourg, Roumania and under-developed countries (a somewhat strange selection). The third part presents the

results of an inquiry into legal practices of the Belgian industry and discusses conclusions that might be drawn from them. It is interesting to observe that according to the answers given by Belgian industrialists 75 per cent of all international contracts include an arbitration clause and 63 per cent adopt the rules of the International Chamber of Commerce (pp. 320, 321). One would like to know the proportion of cases in which the nature and effect and, in particular, the defects of these rules were known to and appreciated by the parties at the date when they entered into the contract as opposed to the date when the dispute arose.

Throughout the volume one is impressed by the stimulating character of the discussion. This applies even where renewed exposition of a doctrine serves to affirm the conviction that its value is limited or perhaps illusory. Thus the notion of the '*lex mercatoria*' (which, probably, is not *lex* at all) remains confused and confusing; it is suggested that before they continue to talk about it its advocates should attempt to define it with that precision which is the hallmark of lawyers. What Messrs. Hanotiau and Jenard have to say about the Draft Convention on the law governing obligations reinforces one's hope that this misconceived project will soon be abandoned. And some aspects of 'international' arbitration which Mr. Lew describes are likely to emphasize the dangers and disadvantages of that much overrated institution. That the claim for the performance of a promise to pay a bribe was dismissed by an arbitrator sitting in Paris would seem to be so elementary as to render it almost ridiculous to suggest that the dismissal of the claim proves the existence of a '*lex mercatoria*'.

Those concerned with the theory and practice of the international economic contract will find much interesting material and valuable discussion in this volume.

F. A. MANN

*Les résolutions dans la formation du droit international du développement. (Études et travaux de l'Institut universitaire de hautes études internationales, no. 13.)* Geneva: Librairie Droz, 1971. 192 pp. Swiss Francs 30.

In November 1970 the Institut universitaire de hautes études internationales at Geneva organized a colloquium on the role of resolutions of international organizations and organs in the formation of international law on development. The colloquium was attended by teachers and students from the Institut and by senior officials from the United Nations Economic Commission for Europe, I.L.O., U.N.C.T.A.D. and G.A.T.T. The present volume consists of the papers (some of them in English) presented and a summary of the discussions at the colloquium.

The approaches of developed and developing countries to the international law of development are often so different that it is difficult for the two groups of countries to reach agreement on the text of a treaty to govern relations between them. Resolutions, being less binding than treaties, are more flexible and often represent a more useful means of developing the law. However, the dividing line between a treaty and a resolution can sometimes be blurred. Professor Virally shows very well in the present volume how the legal effect of resolutions can vary from one resolution to another; at one extreme they can have no legal effect, and at the other extreme they can be virtually indistinguishable from executive agreements (*accords en forme simplifiée*).

Unfortunately the valuable analysis of the relationship between resolutions and treaties is not matched by an analysis of the relationship between resolutions and customary international law. Thus, Professor Abi-Saab writes (p. 9):

Une résolution peut enregistrer l'option et les desiderata de la majorité face à une minorité récalcitrante; elle vise à établir les positions de force plutôt qu'à engendrer des effets juridiques immédiats et remplit ainsi une fonction éminemment politique et non juridique. Une telle résolution ne peut être adoptée que par majorité, car elle ne représente pas le point de vue de la collectivité dans son ensemble.

Une résolution peut aussi enregistrer un dénominateur commun, accepté par tous les participants. Il s'agit ici d'une résolution qui peut être adoptée par consensus et qui, dans la mesure où elle reflète un certain degré d'accord entre les participants, peut avoir un effet non seulement politique mais également juridique.

Of course, if a resolution is regarded as something resembling an agreement, consensus is essential: this explains why U.N.C.T.A.D. has developed the practice of adopting resolutions by consensus. But, if a resolution is also regarded as something which in certain circumstances is capable of reflecting customary international law, lack of consensus may be damaging but it is not fatal; at the very least, the resolution is a means whereby the majority can put pressure on the minority to accept the majority's view of customary law. It is a pity that the present volume does not examine such functions of resolutions.

The political effectiveness of resolutions depends largely on the existence of follow-up procedures, whereby States are required to report periodically on their practice in fields covered by the resolutions. Much of the present volume is devoted to an analysis of such procedures, which were pioneered by the I.L.O. and later copied by other international bodies. However, Professor Abi-Saab is probably going too far when he says (at pp. 9-10) that the legal effect (and not merely the political or factual effect) of resolutions depends in part on the existence of such procedures, for it is perfectly conceivable that States might adopt such procedures even in the case of resolutions which were not intended to have any legal effects at all.

MICHAEL AKEHURST

*Asian States and the Development of Universal International Law.* Edited by R. P. ANAND. Delhi: Vikas Publications, 1972. xxxii+245 pp. No price stated.

This book contains most of the papers presented at a Seminar held at the Indian School of International Studies (now part of Jawaharlal Nehru University) in November 1967. The distinguished contributors are: Nagendra Singh, Quincy Wright, P. E. Corbett, Leo Gross, Richard A. Falk, J. J. G. Syatauw, Upendra Baxi, Rahmatullah Khan, S. P. Jagota, S. K. Agarwala, K. P. Misra, Surya P. Sharma, B. S. Murthy, T. S. Rama Rao and K. Venkata Raman. The book is in four parts; (1) the expanded world society and international law; (2) the Asian contribution to the development of international law; (3) regional international law of the Asian States; and (4) universal international law—development of a common law of mankind. The attempt to include so many topics in such a short volume creates difficulties. Nevertheless, it is a laudable attempt and, as a working guide for further research, the book is likely to command attention.

The emancipated States assert that political decolonization must be followed by cultural and intellectual decolonization: hence the revolt against Eurocentrism—a term, which, Baxi explains, means settled habits of uncritical acceptance of European intellectual traditions. Oppenheim's view that international law in its origin was 'essentially the product of Christian civilization', and the gloomy prediction of Brierly that the international legal system has been weakened as a result of the influx of Afro-Asian States, are partly responsible for the current criticism of so-called European international law and the Afro-Asian plea for a universal international law. In pointing out both the areas of the conflict and the common areas between the traditional rules and the newly emerging norms of the post-colonial era, and thereby indicating a basis for the foundation of a universal legal system, this pioneering work has made a major contribution. The reader will find an admirable assessment not only of the papers contributed but of the discussions at the Seminar in R. P. Anand's Introduction.

Western readers will probably be surprised to find from Nagendra Singh's paper that the concept of the rule of law, and many of the customary or conventional rules of war and peace, embodied, *inter alia*, in international conventions culminating in the Geneva



Conventions of 1949, originated in India and can be traced back to the *Smritis* (220 B.C.–A.D. 400), the *Code of Manu* (200 B.C.–A.D. 100) and State practice in ancient and medieval India. The universality of the application of such principles is considered to be a distinct Indian contribution. In this area there is much scope for further research by Indian scholars and such projects cannot be dismissed as 'a mythopoetic idealization of India's past' as Baxi seems to do.

The Asian-African Legal Consultative Committee is an inter-governmental body with advisory functions. The Committee keeps the International Law Commission informed of the Afro-Asian legal trends in many common areas of investigation, and also examines problems referred to it by the member States. Jagota's review of the work of the Committee is informative and fairly comprehensive. Among others, the Committee has completed its reports on diplomatic immunities and privileges, State immunity, extradition, status and treatment of aliens, dual nationality, legality of nuclear tests, rights of refugees and the law of treaties. Jagota claims, quite convincingly, that the Committee has improved upon the existing rules of international law at least in two directions: first the moral duty of a State to grant asylum to refugees; secondly, restricted State immunity for commercial transactions. Nevertheless, the probative value of the works of the Committee as evidence of international custom is considered doubtful because of its limited membership and the confidential nature of its deliberations.

It appears from Agarwala's fairly exhaustive review of the decisions of the Supreme Court of India that the Court has refrained from entering into a discourse on several relevant principles of international law even though they were specifically placed in issue and has decided particular issues solely on the basis of municipal law.

In dealing with the handling of the Kashmir problem by the United Nations, Rahmatullah Khan lends his legal support to the political stand taken by India, viz: that the Security Council not only by-passed the central problem, which was India's charge of aggression against Pakistan, but spent years over irrelevant issues such as the exercise of the so-called right of self-determination by the people of Kashmir through plebiscite. Although Khan is legally fortified in his conclusion that the principle of self-determination has no application to Kashmir, he seems to have taken a narrow view of that principle which, he says, 'must be deemed to have application to the process of decolonization alone'. This reviewer is of the view that in contemporary law, every territory—trust, colonial, non-self-governing or any other territory, including a technically independent territory—must satisfy the test of self-determination which means transfer of governmental powers to the people unconditionally and without reservation in accordance with their freely expressed will and desire. This legal position has been finally recognized in principle (e) of the Declaration on Principles of International Law adopted by the General Assembly in resolution 2625 (XXV) of 24 October 1970.

The rules of international law defining the status of a body of a gulf which is surrounded by more than one state have not been crystallized. The Geneva Convention on the Territorial Sea and the Contiguous Zone does not furnish any appropriate guidelines. It is in this respect that the legal status of Aqaba and Tiran presents difficult problems. In a lively, informative and balanced treatment of the problem, K. P. Misra has convincingly criticized India's unequivocal support for the Arab cause in the Arab-Israeli dispute on this point.

The growing emphasis on regionalism without any effective control by the United Nations is symptomatic of the failure of the Charter scheme of regionalism within the framework of universalism. It is in this part of the book that the treatment is rather superficial and full of generalizations. Corbett makes a sweeping suggestion that since preliminary authorization of enforcement action is unworkable, the measures of collective control should be confined to *ex post facto* scrutiny. Sharma points out the insignificant role of the Organization of African Unity in attaining consensus on matters of continental importance. In spite of a certain degree of unity favouring regional groupings in Asia, diversity in race, religion, culture, language and above all, differences in economic

power and standards of living, contribute to promote individualism rather than regionalism in the Asian continent. Apart from some stray references to E.C.A.F.E., the Colombo Plan and other regional groupings, there is no serious examination of the diverse economic, social and political factors involved in such inquiries. For instance, such problems as the failure of the U.N.C.T.A.D. in helping the economies of the developing countries, the impact of the growth of disparities between their exports and import requirements, the need for tariff preferences, the role of I.M.F. and the need for long-term lending to developing countries, the idea of regional markets and better measures of self-help—have been conspicuously omitted from the scope of the work under review. We are told by the editor that it was generally agreed that the Asian States had accepted universalism as a basis for international law and there was no such thing as regional international law of the Asian States.

It is a trite observation that international organization and international law are both essential elements in the foundation of a universal international system. There is much discussion by the contributors of the patterns of international organization and the contents of international law in such a universal system. The patterns of international organization envisaged vary from Richard A. Falk's preference for the present system of coercive decentralization augmented and buttressed by a network of military alliances to Quincy Wright's powerful support for a much stronger U.N.O. looking forward to a world federation.

This otherwise informative work, however, may be thought to suffer from one serious deficiency. Although Nagendra Singh and other jurists refer to the concept of non-alignment and peaceful co-existence as India's contribution to international law in modern times, the treatment is rather perfunctory. There is no serious examination of the juridical aspects of three cognate concepts: the cold war, non-alignment and co-existence, from the perspective of the United Nations Charter. Consequently, there is no critical appraisal of the military alliances of the Western and Soviet systems either in the context of Article 51 or Articles 52–4 of the Charter. It is in this field that the Afro-Asian states, including India, have made a major contribution in support of strengthening the universalism of the Charter regime by demonstrating the incompatibility of military alliances with the scheme of the Charter.

SUBRATA ROY CHOWDHURY

*International Law and the Resources of the Sea.* By JURAJ ANDRASSY. New York and London: Columbia University Press, 1970. xviii+191 pp. \$7.50.

This essay on the question of the legal regime of the deep seabed was written before the topic was overtaken by other law of the sea issues. But as one would expect from the author it enshrines legal opinions that are of more than ephemeral value, and it reveals insights into the relationship of the law and geophysics. The first part consists of a survey of the physical and technological aspects of the ocean floor, its resources and the state of technology respecting its exploitation as it was in the late 1960s. The author believes that the 'exploitability test' was not intended to be a lever of constantly expanding claims—as the Australian 'expanding rim' doctrine of 1967 appears to have assumed—but his text was completed just when the *North Sea Continental Shelf* cases were decided, and the results of the decision were only cursorily added. The result is that the geophysical notions of the continental margin as the 'natural prolongation' of the coastal State remain undeveloped.

The delimitation of the continental shelf in special circumstances is the subject of a chapter which incorporated the International Court's decision, and the author considers how analogous notions could be used to partition the seabed beyond national jurisdiction, using the map prepared by the Department of State Geographer. This raises the problem of small islands generating national claims.



Finally, there is a survey of the proposals made up to 1969 for internationalizing the seabed, and Professor Andrassy, while admitting that the extent of national jurisdiction is undetermined, comes down firmly on the side of the establishment of an international seabed agency.

D. P. O'CONNELL

*Les Missions permanentes auprès des organisations internationales*, Vol. III. By E. R. APPATHURAI. Brussels: Établissements Émile Bruylant, 1975. 211 pp. (including bibliography and appendices). Bfr. 1,710.

With the present volume the series of studies of permanent missions sponsored by the Carnegie Endowment is almost complete. The two earlier volumes dealt with the permanent mission in a variety of organizations. Professor Appathurai focuses on permanent missions at the United Nations and, though considerably shorter, his contribution is a worthy addition to the series.

Analysis of the material follows the pattern of the earlier volumes. After a brief historical introduction tracing the development of permanent missions from the early days of the League, the author examines the several roles of the permanent mission and its juridical status. Like the authors of the first volume, Professor Appathurai is concerned to distinguish between the relationship of the permanent mission with the sending State, the Organization (in the shape of the Secretariat and the General Assembly) and other permanent missions. The distinctive character which performance of this multiple role confers on the permanent mission is fully explored, together with the not infrequent situations in which the mission is subject to conflicting demands. In discussing the role of the permanent mission *vis-à-vis* the Organization the author includes an illuminating statistical analysis which shows a dramatic increase in the part played by the members of permanent missions in the composition of national delegations. There is also a short, but interesting, discussion of the growth and significance of bloc voting.

Perhaps the most important findings are contained in the final section, in which Professor Appathurai considers the influence exerted by permanent missions on national and international decision-making. This is for the most part ground that was covered in the earlier volumes of the series in a different institutional context and it is interesting, though perhaps not very surprising, to find that United Nations practice supports the earlier findings. Permanent missions are found to exercise a pervasive influence, of which their recent growth and increasing independence are both a cause and a consequence. No one reading this or the preceding volumes can really have any doubt that permanent missions now play a key role in international organizations, a role which the present volume and its predecessors have illuminated brilliantly.

There is an extensive bibliography and the usual detailed table of contents instead of an index. The three appendices contain the texts of two United States Acts conferring immunities on the personnel and property of international organizations, the Convention on Privileges and Immunities of the United Nations and several General Assembly resolutions on the same subject. It is a matter for regret that the 1975 Convention on the Representation of States in their Relations with International Organizations of a Universal Character appeared too late for inclusion.

J. G. MERRILLS

*La Fraude à la loi*. By BERNARD AUDIT. Paris: Dalloz, 1974. xiii+477 pp. Fr. 60.

The idea of *fraude à la loi* is largely unknown to English law, particularly the English conflict of laws, and the long history of English law has in fact shown that it is possible to dispense with it. In France, on the other hand, it has had great influence for many years, and probably it was a good idea to submit its present status to a comprehensive



review. The present work, introduced by enthusiastic words of recommendation by Professor Loussouarn, is devoted to the discharge of this task.

While the book is in every respect most erudite and scholarly and characterized by a welcome use of comparative material, the basic difficulty which the present reviewer continuously experienced is that the term *fraude à la loi* is used in a sense which is by no means clear, which is certainly different from the English understanding of the term and which, indeed, seems to be far removed from what one normally considers to be fraud, *fraude* or *fraus*. In the Introduction one reads (p. 8) that the term designates 'toute éviction par une loi étrangère d'une loi *plus compétente*'. The conclusion of the first part, in the course of which the author's general theory is developed, states that the term indicates in all cases 'une violation objective de la loi fraudée par application d'une loi étrangère dont le titre à gouverner la situation considérée est *largement moindre*'.

Such statements are vague and therefore troublesome and one begins to understand why the book discusses numerous cases which one would have hesitated to treat as *fraude à la loi*. This applies, for instance, to flags of convenience or to marriages celebrated abroad by virtue of the maxim *locus regit actum* or to the subjective and objective doctrines of the proper law. It is not easy for an English lawyer even to realize where in such and many similar cases the idea of fraud arises: parties who make use of what the law permits cannot be said to be fraudulent, nor are there any degrees of fraud possible.

The danger of having one's mind fixed on fraud is illustrated by the author's treatment (p. 4) of the famous *affaire Beaufremont* (Cass. Req., 18 March 1878, S. 1878, 1.193). A French woman, separated from her husband, was naturalized in Germany and at a time when she could not obtain a divorce in France she divorced her husband in Germany and remarried there. M. Audit says that, since *fraude à la loi* is to be defined 'comme utilisation volontaire de la règle de conflit par manipulation de l'élément de rattachement afin d'échapper à une disposition impérative', this was a case in point. But was it not the vital fact of the case and its decision that under French law the German naturalization was invalid in the absence of the husband's consent and that consequently the German divorce was invalid quite apart from any fraud?

However this may be, M. Audit's work is undoubtedly extremely learned and informative, even if it has left at least one English lawyer somewhat puzzled.

F. A. MANN

*The Treaty Maker's Handbook*. Edited by HANS BLIX and JIRINA H. EMERSON. Dobbs Ferry, New York: Oceana Publications; Stockholm: Almqvist and Wiksell, 1973. 355 pp. Sw. Kr. 90.

With this book the need for a new and up-to-date collection of specimen treaty clauses has been fulfilled. The first of the twenty-one sections sets out some typical constitutional provisions on the conclusion and application of treaties. The second contains rules and instruments relating to full powers. The remaining sections group sample clauses dealing with every aspect of the formal law of treaties, together with relevant diplomatic correspondence. A wide variety of treaties is cited. In the section on withdrawal, for example, Article Four of the Test Ban Treaty is to be found between the less familiar denunciation provisions of the 1953 Opium Protocol and the 1963 International Olive Oil Agreement. The selection of diplomatic material is equally broad.

The editors declare that their selected provisions are intended as illustrations, not models. For this reason no commentary or recommendations are appended. This will not seriously limit the usefulness of the collection. The Uppsala seminars for which these materials were originally compiled were intended to acquaint young lawyers from the developing world with current treaty practice and the practical value of the collection is plain. To the law teacher it will also serve as a rich source of examples. The section on types of treaties and instruments resembling treaties, for instance, brings together five

types of declaration, seven types of agreement and two kinds of protocol, as well as examples of a *procès-verbal*, a memorandum of understanding, a *modus vivendi* and an exchange of notes, in a concise illustration of the variety of forms in current use.

The book is well produced and pleasingly laid out and it is clear that exceptional care has been taken to avoid misprints. The Vienna Convention on the Law of Treaties is set out in full at the end. An index of the other treaties quoted would also have been useful.

J. G. MERRILLS

*Le Préjudice dans la théorie de la responsabilité internationale.* By BRIGITTE BOLLECKER-STERN. Paris: Éditions A. Pedone, 1973. 382 pp. (including bibliography). No price stated.

The concept of damage in international law raises so many theoretical and practical issues that no work of reasonable length could pretend to be both detailed and comprehensive. In this contribution to the already considerable literature on the subject Mme Bollecker-Stern has struck a good compromise. Her wide-ranging survey covers all topics of major importance and focuses on those items of greatest current interest. Thus the problem of the *novus actus* in its various forms is dealt with only briefly, but other aspects of the remoteness issue, notably the impact of the loss-creating act on third parties, are discussed more fully in view of their relevance to recent international litigation. The thorny problem of compensation for *lucrum cessans* is perhaps too briefly dealt with. As the largest head of damage in the commonest type of international claim, this issue might with advantage have received more emphasis. In contrast, contributory negligence and such related issues as the controversial 'clean hands' doctrine are analysed in considerable detail.

*Barcelona Traction* is of course a recurrent theme. In discussing the bearing of the case on the issue of *locus standi* Mme Bollecker-Stern uses the parties' submissions to identify the exact points in issue and with their assistance is able to illuminate some of the more obscure passages in the Court's judgment. The suggestion is made that in its *obiter dicta* the Court took a further hesitant step towards recognizing the existence of international duties *erga omnes*. In rejecting Belgium's claim to act on behalf of the shareholders, however, the Court's decision is seen to be in line with earlier decisions. With the first conclusion it is easy to agree, subject to the difficulties of the *South West Africa* cases and the judgment in the *Northern Cameroons* case, which are duly noted. Evaluation of the Court's decision on the main issue, however, surely calls for some discussion of the numerous lump sum settlements and arbitrations involving the shareholders' national state, which the Court has been much criticized for disregarding. Some assessment of the practical merits of the Court's decision would also have been useful. Though the emphasis throughout is on theoretical rather than practical issues, it must be said that Mme Bollecker-Stern's conclusions are always amply supported by reference to the leading decisions. There is an extensive bibliography of works in the main European languages. Mme Bollecker-Stern's work can be recommended as a general but comprehensive survey of a topic of concern to every international lawyer.

J. G. MERRILLS

*The Law of International Institutions.* By D. W. BOWETT. 3rd edition. Published under the auspices of the London Institute of World Affairs: The Library of World Affairs, No. 60. London: Stevens & Sons, 1975. xvii+382 pp. £5.80 (paper covers); £8.50 (hard covers).

This work has deservedly established itself as the standard manual of the law of international organizations in the English language. Now in its third edition the book brings



up to date the information on the various inter-governmental bodies and their manifold legal problems. The writer's presentation is concise and illuminating. He very aptly combines description with analysis. After a brief historical introduction, global and regional organizations are discussed, and the writer has devoted a separate part to judicial institutions. There is also a valuable study, of a comparative nature, of the common institutional problems. Perhaps in the next edition Chapter 12, excellent as it is in its present form, could be enriched by some further topics such as control and supervision exercised over national action by inter-governmental organs, sanctions, or law-making activities other than amendment procedures and conclusion of treaties. Dr. Bowett deals with legislation in connection with the specialized agencies of the United Nations (pp. 127-32), yet a broader context is possible.

K. SKUBISZEWSKI

*Zwang beim Abschluß völkerrechtlicher Verträge. Eine Untersuchung der in der Wiener Vertragsrechts-Konvention von 1969 getroffenen Regelung.* By HARTMUT BROSCHE. *Schriften zum Völkerrecht*, Vol. 35. Berlin: Duncker & Humblot, 1974. 250 pp. (including appendices, bibliography and index). DM. 59.60.

Coercion in the conclusion of treaties figured prominently among the controversial subjects of the Vienna Conference on the Law of Treaties. The solution adopted is by no means free from ambiguities. This book, which presents a thorough analysis of the legal problems surrounding the use of force in the conclusion of treaties, is therefore of considerable practical interest.

The author finds the question of coercion directed at the representative of a State relatively easy and consequently directs his attention almost exclusively to the more difficult problem of the threat or use of force directed at States. In a historical introductory chapter he traces the development of the prohibition of force in international relations and its effects on the law of treaties. A further section is devoted to a detailed presentation and analysis of the legislative history of what eventually became Article 52 of the Convention. Special attention is also devoted to the procedural provisions.

A large part of the study is devoted to the question of the existence of a legal principle, independent of the Vienna Convention, which would void treaties concluded under coercion. The author argues cogently that, although the prohibition of the use of force has indisputably influenced thinking in this field, such a principle does not follow by derivational logic from Article 2, paragraph 4, of the United Nations Charter. An examination of State practice in the last few decades also does not lend much support to the assumption that Article 52 is the expression of a *lex lata*. In one or two cases there is even evidence of an endorsement by United Nations organs of treaties procured by the threat of armed force. In other cases such treaties were never challenged. The conclusion is that the rule as embodied in the Vienna Convention is essentially a new development in treaty law.

A number of particular questions covered by this book are of great interest: one of them is the causality between the use or threat of force and the conclusion of the treaty. While a rule depriving an aggressive State of the fruits of its illegal activities in the form of treaties is usually based on sound policy considerations, an extension of nullity to all agreements entered into under conditions of force or threat of force bears grave dangers. Treaties have an important public order function in the termination and alleviation of violent crisis situations. In these cases a threat of hostilities or renewed hostilities is invariably present. To expose armistice or peace agreements to the prospect of being declared void would have a dangerously destabilizing effect on international relations. The author therefore recommends the application of Article 52 only to situations in which the purpose of the force or threat of force was primarily directed at the conclusion of the treaty.



Another interesting and highly controversial question is the effect of economic and political coercion. It did not gain entry into the text of the Convention itself but found expression in two special declarations by the Conference in Vienna. The author comes to the conclusion that, at the present stage of development of the law, a wide and unchecked interpretation of 'force' in Article 52 would largely remove the regulatory effect of reciprocities and retaliations underlying international intercourse.

Finally, the legality of the use of force is an important problem in applying Article 52 of the Convention. The extensive reliance by States on self-defence in justifying resort to armed force is a threat also to the application of this provision of the Treaty Convention, which declares treaties void only if they are 'procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'. A treaty imposed by a State successfully exercising its inherent right of self-defence would therefore be unaffected. It is not difficult to perceive that this possibility may easily lend itself to abuse. It seems doubtful whether the definition of aggression adopted by the United Nations General Assembly after the completion of this book will do much to clarify this problem. The author is not prepared to give absolute liberty to the victorious victim of an armed attack to dictate a treaty but requires some proportionality between the occasion and the terms of the treaty.

This monograph is a successful and instructive addition to the rapidly growing literature on the Vienna Convention on the Law of Treaties.

CHRISTOPH H. SCHREUER

*The Legal Régime of Hydrospace.* By E. D. BROWN. London: Stevens & Sons, 1971. xx+236 pp. £4.50.

This is a rather ambitious title for what is, in fact, a work intentionally restricted as to the subject-matter it touches. It suggests that all law relating to 'water space' is within its scope, which, even if one excluded rivers and lakes, would still involve territorial waters, inland waters, fishery zones and shipping law. In fact it covers only the exploitability criterion of the extent of the continental shelf, the delimitation of a common continental shelf and the regime of deep-sea mining beyond the continental shelf—topics which altogether take up the first 126 pages—and the marine pollution treaties which take up the last 84 pages.

Dr. Brown does say that he regards this work as supplementary to his two other studies on 'hydrospace', namely those concerning military uses—which this reviewer found a much more significant study—and marine research. But when this is conceded the whole is but a piecemeal legal study.

It is, of course, not Dr. Brown's fault that by the time such a book comes for review so much of the subject-matter has been overtaken. That is the nature of the subject-matter, and if one were daunted by the impossible problem of stabilizing the text in such a fluid topic there would be no books at all. But it still remains true to say that in respect of marine pollution there have been two amendments to the 1954 Convention and four new Conventions since the book was published. What remains useful about the text is the brief notes on policy requirements, with reference to various technical studies and proposals. However, these indications are so brief as to be little more than a guide to the topic headings. The collision of broader interests between the coastal States group and the shipping nations that was evident at the Dumping Conference in 1972 and the Pollution Conference in 1973, and the link with policies respecting the Law of the Sea Conference, is not fully anticipated.

On the subject of the extent of the continental shelf Dr. Brown rejects the view that the doctrine of natural prolongation in the International Court's judgment authorizes the delimitation of the continental shelf by reference to the seaward limit of the natural prolongation of the land territory into the sea, namely the continental slope or continental rise. He provides other specific conclusions as to 'adjacency' but not much guidance as to what is meant by 'admits of'.

The size of the book prevented Dr. Brown from making more than spasmodic references to State practice or legislation. The most interesting part of it concerns the structure of an international regime of deep-sea mining, which is based upon a registration system.

D. P. O'CONNELL

*Répertoire des décisions et des documents de la procédure écrite et orale de la Cour permanente de justice internationale et de la Cour internationale de justice*, sous la direction de Paul Guggenheim. Série I, *Cour permanente de justice internationale 1922-1945*, Volume 3, *Les Sujets du droit international*. By LUCIUS CAFLISCH, with C. VERDON, H.-J. GEISER, H. B. REIMANN. Geneva: Publications de l'Institut Universitaire des Hautes Études Internationales, 1973. 792 pp. No price stated.

Volume 3 in this series concerns the subjects of international law, a rubric which is taken to include such related matters as domestic jurisdiction and State succession. With these inclusions, the present volume is still rather smaller than either of its predecessors, and even then contains a good deal of repetition, as identical or nearly identical passages are reproduced in two or three or sometimes more places for different purposes. A better system of cross-reference might have reduced its size considerably.

The emphasis throughout is on the arguments and pleadings before, rather than the judgments of, the Permanent Court. Their substance presents perhaps few surprises: the brilliant argument of M. Basdevant in the *Austro-German Customs Union* case is undoubtedly one of them. As a matter of arrangement, the statement 'la cour ne se prononce pas sur ce point' which follows many of the extracts can be misleading (as at p. 105) or even quite inaccurate: thus in *Polish Vessels in the Port of Danzig* the Court did in fact rely on the presumption in favour of State freedom of action (*contra*, p. 142: cf. p. 690).

Nearly 100 pages are devoted to the *Customs Union* case: on the other hand *Lighthouses in Crete and Samos*, equally important to the question of independence, is rather cursorily treated. In particular the important separate opinion of Judge van Eysinga in that case is relegated to the section concerning 'Autres Entités' (cf. p. 149).

These few qualifications notwithstanding, this is a careful and convenient compilation of material otherwise much less readily accessible.

JAMES CRAWFORD

*Le Droit des peuples à disposer d'eux-mêmes*. By S. CALOGEROPOULOS-STRATIS. Brussels: Établissements Émile Bruylant, 1973. 389 pp. Bfr. 980.

The principle of self-determination has been one of the battlegrounds of western international law, and writers in that tradition have accordingly tended to concentrate on the single issue of whether self-determination is a positive legal right, or at any rate a legal principle. As a result, there has been insufficient elaboration and discussion of particular problems within the rubric 'self-determination', although, in view of the amount of State practice, the latter might be thought the more useful inquiry. This work is one of a number of recent monographs which seek to fill the gap.

M. Calogeropoulos-Stratis emphasizes, both in his introduction and elsewhere, the derivation of self-determination as a political principle from the French revolution. In the history of ideas this may well be correct, but in diplomatic practice it is more doubtful. Consistently with this attribution, however, he treats self-determination as a general right, applicable not only in the colonial context but also to attempts at secession from a metropolitan State. Moreover, self-determination, in the author's view, is closely related to general human rights and freedoms: it is a humanitarian, rather than a merely



political, right. In the inter-war period, self-determination, though influential as a political doctrine, was not established with sufficient consistency to be regarded as a customary legal right. Instead it was applied, *comme une règle d'exception*, by various multilateral treaties to particular cases of minorities, disputed territories, transfer of population, mandates, and so on. However, with the advent of the Charter, self-determination has become, both in United Nations practice and generally, a positive legal right whereby 'peoples', that is, ethnic and racial majorities in a certain territory, have the right to form an independent State, if they so choose. Self-determination as a legal right is not, in the author's view, restricted to territories of colonial type: on the contrary, to limit self-determination to the colonial situation is completely to distort its classical meaning (p. 198). It includes colonial territories which, by virtue of the rule are no longer regarded as subject to the sovereignty of the administering territory (p. 113), but it extends also to peoples within a metropolitan territory who, either because of their minority position or for other reasons, desire to form an independent State. Hence Biafra was deprived of its right to self-determination by the action of the O.A.U. and the inaction of the United Nations (pp. 342-8).

Many of the writer's conclusions would now meet with general assent. There can be little doubt that self-determination is now a juridical principle, and in some circumstances a positive legal right having important consequences. On the other hand, self-determination as a legal right is generally regarded as restricted to situations of the colonial type. To assert that it also applies as a matter of right to cases of secession from metropolitan States is to fly in the face of most modern practice. And although it may be that logic demands, and practice in certain cases, such as Bangladesh, supports, the extension of the principle in some circumstances to metropolitan territories, the extent and nature of that extension require examination and critical inquiry which they do not here receive. Two further matters of major interest are not dealt with: the effect of self-determination on the rules relating to the use of force, and alternative statuses such as self-government and association which are regarded as available to self-determination units.

These general criticisms aside, there are a number of specific comments to be made. The reasoning is at a very abstract level: only in the last chapter does the author discuss State practice in any detail, and then only selectively. The Katangan secession is not mentioned. Bangladesh, a test case for the author's position, is only briefly discussed. There is little analysis of the Rhodesian case. The important differences between the two Reports on the Aaland Islands are virtually ignored. Footnotes and references tend to be fragmentary, and the bibliography is restricted almost exclusively to the French literature. References to international jurisprudence lack detail and precision. There are too many categorical statements, too many generalizations, and a certain amount of direct mis-statement. For example, it is stated, incorrectly, that 'C' class mandates were 'annexés à l'État mandataire' (p. 87). The view that Article 73 of the Charter deprives metropolitan States of sovereignty over non-self-governing territories must equally be regarded as very doubtful (p. 113; cf. p. 213). The examination of the Cyprus question fails to deal with the international peace and security argument which has, in fact, been of considerable importance. Hence the conclusion that Cypriots should be allowed to decide their future by internationally supervised plebiscite (p. 341) ignores both the realities, and, it is thought, the legalities, of the situation.

JAMES CRAWFORD

*La Règle de l'épuisement des voies de recours internes.* By JEAN CHAPPEZ. Paris: Éditions Pedone, 1972. xii+263 pp. No price stated.

The local remedies rule enables a State to rectify its own mistakes but is open to the criticism that a State should not be judge in its own cause. From this conflict, elaborated in the Monist and Dualist theories, there derives much of the confused treatment of the



subject and the debate whether the rule is one of substance or procedure. It is of practical advantage to the individual claimant, his espousing State and the defendant State, that the facts of the claim and the reparation should be quickly and cheaply determined and in many cases this can be done best in the local courts, but in so doing, the local courts may either serve as a procedural preliminary to an international proceeding or provide an essential element in a substantive cause of action, which, thus, only arises after resort to local remedies. This distinction has importance for on it depends the treatment of the rule as a preliminary objection or a defence to the merits before international tribunals, the determination of the date at which State responsibility commences, obviously important in deciding nationality of the claimant and time-limits, and the nature of the evidence and burden of proof to establish the rule.

The first section of Jean Chappez' monograph examines this topic, summarizing the arguments of the many writers in the field. His decision that the rule is procedural is unexceptionable but, as Fawcett and Amerasinghe have shown in writings of greater acumen, the category 'denial of justice' then presents problems. Chappez defines denial of justice as 'tout acte ou omission contraire aux standards internationaux des étrangers émanant des organes chargés de rendre la justice'. He says it occurs as soon as the lowest tribunal decides against the claimant, and appeal or later stages in the case constitute the claimant's compliance with the procedural rule of exhaustion of local remedies.

This academic solution is impracticable. It is rarely possible in a complex system to pinpoint the stage at which international law is breached, certainly impossible during litigation and very arbitrary when undertaken after the event. The provision of appeal and alternative remedies contemplates that litigants may be unsuccessful at first instance but does not imply that they all suffer a failure to meet international standards at that stage. The burden of complaint against a State is that there is no judicial system to exhaust or that it has wholly failed to provide the alien with a remedy. This complaint is much easier to sustain against a primitive judicial system than against a State which provides a modern sophisticated system, with guarantees for individuals' rights.

The second section of Chappez' book discusses the type of State misconduct which is subject to the rule. He is not particularly helpful in elucidating the marginal areas of a State's jurisdiction—in the airspace, on or under the sea—where claims may arise. He notes that a category clearly within a State's jurisdiction, namely disputes relating to nationalization of property or interference with investment, is increasingly withdrawn from the operation of the rule, either because it self-evidently provides no remedy or because a specialist technical tribunal offers a better solution. Where a State consents to international settlement, it is arguable that a presumption arises that the local remedies rule is still applicable. Chappez examines the treaty and case material and maintains that the rule should not apply without express incorporation where States have agreed to submit their dispute to conciliation or to set up an *ad hoc* arbitration tribunal.

In cases where the rule applies, authority is not clear how widely the term 'remedies' is to be construed. Is the extraordinary remedy, the revision of the case by a Cour de Cassation, the petition to Congress or a chamber of the legislative body, the petition to the Queen or the Governor of a British Colony included within the remedies which it is obligatory to exhaust? Here Chappez supplements the older material with decisions of the European Commission and Court of Human Rights. This case material is particularly valuable as it is very detailed, evolved in relation to mature legal systems of European countries and is virtually the only published modern source of consistent application of the local remedies rule.

In considering the content of the rule, Chappez discusses the standard of care required of the litigant in exhausting the available remedies. He has little new to offer here, but after examining the *Finnish Ships* and *Ambatielos* arbitrations, suggests that the strict standard supported by Lauterpacht, that remedies must be employed 'however theoretical or contingent' 'unless shown to be manifestly futile', should be abandoned for the test of normal practice and the reasonable lawyer.

This book contributes little new to the analysis of local remedies. It draws heavily on Amerasinghe, *State Responsibility for Injuries to Aliens*, 1967. The author refers to decisions of the European Commission and Court of Human Rights but these are not systematically set out nor analysed. The European material is not included in the case list and this is not paginated with the text. This book may fill a need in the French language but a second edition of Amerasinghe incorporating the recent European material would be of greater value to English readers.

HAZEL FOX

*A United Nations High Commissioner for Human Rights.* By ROGER STENSON CLARK. The Hague: Martinus Nijhoff, 1972. xv+186 pp. Gld. 31.50.

Suggestions for implementation of the human rights provisions of the Charter are most welcome. The author wrote the first draft of this book under the supervision of Professor Richard N. Gardner, who, in his foreword, asserts that the appointment of a High Commissioner for Human Rights is a timely idea and that its opponents will lose in the end. There are three main approaches to the international implementation of human rights standards: government to government level, direct access of individuals to an international commission or tribunal, and implementation through an international executive which can influence government action through fact-finding, publicity and persuasion. The idea of the High Commissioner comes under the third category.

The proposals for establishing an office of High Commissioner have been before the United Nations in various forms since 1947. In December 1971 the General Assembly deferred for two years its consideration of the 1967 recommendation of the Economic and Social Council for the establishment of the office of United Nations High Commissioner for Human Rights. In Chapter 1, the author has examined the past efforts in this direction and pointed out the inadequacies in their results. Chapter 2 considers the history of the High Commissioner proposals. Chapter 3 is important and deals with the proposed activities of the High Commissioner—the ways in which he might assist the United Nations organs and States, the extent to which he might deal with individual complaints, the use he might make of his reports to the General Assembly and the expediency of using publicity or quiet diplomacy in achieving his objects. Chapter 4 is concerned with administrative matters and the High Commissioner's relationship with the Secretary-General. Chapter 5 examines the legality of the office in the context of the expected opposition based on Article 2 (7) of the Charter. Chapter 6 envisages the role of the High Commissioner to be that of a catalyst in the creation of international customary law, as a promoter of human rights standards, rather than that of judge or enforcer.

The author is to be congratulated upon his comprehensive and yet reasonably succinct treatment of a subject still in development. He has indicated how the appointment of a High Commissioner can help ratifications of the human rights and related treaties, and the manner in which gross violations by parties to the ratified treaties can be placed in issue in spite of limited enforcement procedures and limited sources of information. The author is under no illusion about the prospects of the implementation of the proposal in the immediate future, but he rightly feels that 'the academic who speculates about what the diplomats will do is doomed to embarrassment'. The book is well indexed and there is an adequate bibliography.

SUBRATA ROY CHOWDHURY

*International Law and the Independent State.* By INGRID DELUPIS. Epping, Essex: Gower Press Ltd., 1974. xi+252 pp. £7.50.

The author states in the Preface of the book that she intends to analyse the meaning of independence and self-determination and their practical implications: the right to secede



from colonial rule, the right to organize a community as a State sees fit, and the right to remain free from foreign interference. She restates these objectives on p. 18 and deals with restrictions of sovereignty over territory and over individuals and property. She refers particularly to the problems of new States and in the last chapter deals with 'coercion and consent', unequal treaties and certain changes in traditional international law. One of the problems which is extensively examined is that of minimum standards of international law in relation to the treatment of foreigners. The author indicates how much of the minimum standards can be rescued in present circumstances in which development planning in new States requires drastic changes and legal reorientation. She relates the treatment of aliens to the rules of human rights and states that, in case of violation of rights, aliens may be entitled to better remedies than nationals. In particular the home State of the aliens may intervene in their defence and even take the territorial State to court. This can be done after exhaustion of local remedies. Moreover, in case of expropriation an alien has a right to compensation which the citizen of the territorial expropriating State may not enjoy. In this respect reference should be made to the draft Charter on Economic Rights and Duties of States prepared by U.N.C.T.A.D.

Another problem of fundamental interest to new States is that of State succession. The author refers on p. 174 to the so-called devolution agreements and states that the various techniques of such agreements have been examined in the literature of international law 'but no one has discussed the form in which the consent of the new State is given'. Then follows an extremely useful survey of State and treaty practice in recent years from which the author draws her conclusions. She distinguishes the succession and the accession formulas. In the first case a new State is bound by a treaty retroactively, from the date of its independence. In the second case a new State is bound from the date of accession to a treaty and there is no retroactivity. The author states emphatically that there is no automatic devolution and that the consent of the new State is essential to secure treaty succession. She refers to the fact that the Secretary-General of the United Nations wrote to all new States which signed devolution agreements, asking them whether they confirmed the fact of devolution and their adherence to treaties of which the United Nations is the registering depositary. This part of the book contains a valuable contribution to the formulation of international law in a new family of nations in which the new States have a right to participate in the process of law-making. Some of the outdated principles of the international law of the nineteenth century will have to give way to the new international reality.

In the last part of the book the author discusses unequal treaties. The reader is here faced with the clash of two alternatives. Should unequal treaties be subject to the principle of *rebus sic stantibus* or should they be subject to the theory of 'continuous consent'? The author admits that the former principle has been incorporated in the Vienna Convention on the Law of Treaties but she prefers to see unequal treaties (whenever necessary) invalidated on the basis of lack of continuous consent. But one wonders whether this theory is not a threat to *pacta sunt servanda*, and this becomes evident when the author states that any member State of the E.E.C. could withdraw from the Organization if its consent ceased to be continuous. The requirement of a vital change of circumstances seems to be a better guarantee of relative legal stability than a theory according to which withdrawal of consent is all that is needed to do away with a treaty.

There are a few points on which it is difficult to agree with the author. She speaks about unequal treaties as if they were a new phenomenon in international law. But nearly all classic writers of the law of nations dealt in detail with unequal treaties and their writings are full of arguments which could be useful to present-day lawyers. Historiophobia contributes little to legal science. The author classifies the former capitulation treaties (in favour of Europeans resident in Afro-Asian countries) as unequal treaties. This may be a correct classification but recent research has shown that there were numerous capitulation treaties concluded with Asian and African countries in the past which gave capitulatory privileges to their traders resident in Europe, e.g. the Persian-Dutch



treaty of 1631 which established a Persian settlement in Amsterdam, and the French-Moroccan treaty of the same year which gave the Moroccan ambassador in France jurisdiction in disputes between African residents in France. Finally, the author seems to imply that the new States are bound by existing customary law. This may be a useful presumption but is it irrebuttable? If so, it would undermine the positivist rule that international law is based on the consent of States, and there are now 140 States the majority of which may accept the bulk of international law but insist on a change of certain principles which are odious to them. However, irrespective of whether one agrees with the author or not on this or that point, one cannot but admire her scholarly approach to the subject and the originality and skill with which she presents her arguments to the reader.

CHARLES HENRY ALEXANDROWICZ

*Finance and Protection of Investments in Developing Countries.* By INGRID DELUPIS. Epping, Essex: Gower Press Ltd., 1973. 183 pp. £6.50.

There is little doubt that 'the businessman, the banker and the lawyer concerned with investment in developing countries' who comprise the audience for this book, according to the publisher, would find some parts of it useful as a manual of recent developments, particularly the sections on national investment guarantee schemes (pp. 135-54) and the case studies of joint ventures (pp. 158-73). However, it is not sufficiently detailed for advisers to large companies, and most of these by now have developed their own expert knowledge of foreign laws and the relevant rules of private and public international law. They will also have collected the main source materials necessary for preparation of negotiating or litigating briefs, for drafting contracts or joint venture schemes, and for advising on proposals made by host countries or new provisions in their laws. With reference to sources and to investment guarantees, the *Valentine Petroleum and Chemical Corporation* case, the first arbitration under the United States Investment Guaranty Program is discussed by the author (pp. 150-4). Readers may care to note that the arbitration is fully reported in Volume 44 of the *International Law Reports*.

Students of business management and of some economics courses, and their teachers, would find the book stimulating and informative. For law students there is little that is new and much that is argued with greater clarity elsewhere. Dr. Delupis puts forward a few controversial propositions, among them 'that the power of eminent domain [or nationalization] cannot be fettered by treaty, as little as it can be affected by state contracts' (p. 85 and pp. 30-1). However, she immediately says that certain conditions must be fulfilled for a nationalization of foreign property to be lawful under international law—no discrimination, there must be a public purpose, and adequate compensation. In other words, there is a silent clause in every treaty which expressly places *greater* restrictions on the parties' right to exercise their sovereign power of expropriation than do these customary rules that the greater restrictions are binding only so long as either party unilaterally chooses to keep to them. In short, these treaty provisions are not binding at all. This is a strange and novel doctrine which would have repercussions throughout international law for it calls in question the whole basis of treaty rights and obligations. Perhaps Dr. Delupis resiled from the full implications of her argument, because she also states that although nationalization contrary to a treaty provision is not 'necessarily illegal', 'the case is different if the state has deliberately misled a foreign investor'. Then compensation for nationalization 'must include some punitive damages to an investor who relied on a fraudulent promise by a host government' (pp. 31 and 86). The wrongfulness of the breach of treaty is made to depend upon the state of mind of the party when it agreed to restrict the exercise of sovereign rights. Moreover, the author fails to distinguish the wrong done to the other contracting State (and any damage this causes) from the damage suffered by the investor in consequence of that wrong. According to her argument there is no illegality or international wrong in breaking an undertaking made in

good faith with no intention to mislead. One is entitled to question her consistency when one compares these passages with her discussion of public purpose and 'the problem of intention'. She there submits that 'a State does not possess a mind by which it can commit acts by *dolus* or by *culpa*' and 'we can only assess the legality of State action under international law by analysing the effect, not by any hypothetical arguments about what the "intentions" or even "motives" could have been' (p. 77).

To balance these critical remarks, the reader's attention is drawn to the clear and careful examination of the theory of acquired rights and the function of this theory in the law relating to taking of foreign owned property (pp. 105-13). (This is not to say that this subject or Dr. Delupis's conclusions lack controversy, but space does not permit further discussion here.) This reviewer's general assessment is that at £6.50 for 183 small pages this book is too expensive to recommend to students for purchase, that it is of limited but definite value to any advisers of companies to whom these problems may be unfamiliar, and that it can serve as a useful introductory *tour d'horizon* for the researcher.

GILLIAN WHITE

*The Conflict of Laws.* By DICEY and MORRIS. Under the general editorship of J. H. C. MORRIS with specialist editors. Ninth edition. London: Stevens and Sons Limited, 1973. cxxxvi+1205 pp. £17.

This new edition which follows the preceding one after an interval of only six years appeared almost simultaneously with the enactment of three important statutes, viz. the Supply of Goods (Implied Terms) Act 1973, amending the Sale of Goods Act 1893, the Matrimonial Causes Act 1973 and the Domicile and Matrimonial Proceedings Act 1973. Consequently 'the three surviving editors' (p. xii), Dr. Morris, Professor Kahn-Freund and Mr. Michael Mann, were compelled at once to publish a first supplement which supersedes substantial parts of the main work. This, of course, is bad luck both for the editors and the reader, but does not jeopardize the outstanding quality of a great work which, as a result of a continuous process of revision under the guidance of its indefatigable general editor, has disproved the impression that old age means staleness, decline, degeneration. On the contrary, there is clear evidence that, while the main structure has remained intact, much fresh thinking and checking has added strength to and led to noticeable improvements of one of the most influential works the English legal profession has produced. The result is a book which commands genuine admiration.

It would be invidious to attempt to enumerate the manifold changes incorporated into the present edition. Every detail has been taken care of, but more extensive alterations have also frequently been made; they are conveniently listed in the Preface. The present edition, including the index, is about eighty pages shorter than the eighth, though as regards the actual text Dr. Morris can proudly tell us (p. xi) that 'although there are about 125 pages of new material in this edition, it is only 14 pages longer than its predecessor'. That the cost of the book has risen by seventy per cent. is in line with one of the most depressing signs of our time. There are, however, three entirely new sections. It is, perhaps, not inappropriate to say a few words about them.

The old problem: domicile or nationality? is now succinctly discussed (pp. 128, 129). The conclusion, as was to be expected, is that 'nationality breaks down altogether if the State contains more than one country in the sense of the conflict of laws'. Yet the fact that within such countries as the United Kingdom or the United States there exist several 'law districts' does not necessarily mean that for international purposes the test of nationality would not be practicable or perhaps preferable. An English court might well think that a French national domiciled in Brazil should be held to be subject to the law of France, as, so we assume, both France and Brazil would do and as English courts would do by means of *renvoi*.



Chapter 12 on statutory restrictions on jurisdiction (pp. 209-14) is new. Here one finds references to a number of statutory provisions which give effect to international conventions regulating the exercise of jurisdiction in member States.

A much more challenging innovation is achieved by the new Chapter 27 on trusts. This fills a gap which for a long time had been felt to be glaring. It was almost paradoxical that before 1973 the leading textbook on the English conflict of laws had so little to say about what undoubtedly is one of England's greatest contributions to the law as a whole. The new chapter discusses the subject under three headings, namely, the validity of trusts, the administration and the variation of trusts. Nothing, however, is said about the difficult and important problem of the constructive trust. It may be that this omission is due to the general policy (though it is slightly relaxed in the present edition) of ignoring matters which have not come up for judicial decision. Such would be an insufficient explanation. The constructive trust and its divers emanations are of considerable significance, and the question, for example, whether in the conflict of laws the rules relating to contracts, torts or property should be applied gives rise to fine points on which the practitioner needs guidance. Or what about the right of beneficiaries to claim trust property from third parties such as purchasers with or without notice? Indeed, what about the existence of a trust? Is a situation arising in a foreign country which does not recognize trusts to be classified as a trust in this country? It does not appear that Dicey and Morris provide an answer. Where they do discuss the validity of trusts, they rightly state that the material validity of a testamentary trust is in general governed by the law of the testator's domicile at the time of his death, but as regards trusts *inter vivos* it is suggested that 'the validity, the interpretation and the effect' are governed by the proper law. Is the interpretation and effect of a testamentary trust subject to a law other than the testator's *lex domicilii*? According to Rule 123 the administration of a trust is governed (*semble*) by the law of its place of administration. Administration is said to include such matters as the powers and duties of trustees, their liability, their remuneration, the appointment of new trustees and so forth. This provokes grave doubts, not only because the place of administration, as Dr. Morris seems to recognize, often cannot be readily identified and even if identified is not always a really relevant point of contact. More particularly, it must be asked why the law of the place of administration should be allowed to override the law governing the trust instrument. Suppose an English trust is administered in Switzerland. Why should the liabilities of the trustees be measured by Swiss rather than English law? Why should the appointment of new trustees be determined by Swiss law (which in all probability has nothing to say about it)? Perhaps it is unfair to raise these questions, for the subject demands monographic treatment. As this reviewer can testify, it is a subject that almost defies systematic analysis. However, Dr. Morris has made a beginning and, therefore, deserves gratitude for this contribution, as, indeed, for the totality of his work.

F. A. MANN

*United Nations Resolutions. Series I: Resolutions adopted by the General Assembly. Vol. I: 1946-48. Compiled and edited by D. J. DJONOVICH. Dobbs Ferry, New York: Oceana Publications, 1973. lxi+358 and (appendices) 147 pp. \$40.*

In 1969 the General Assembly considered a proposal to publish a collection of all the resolutions adopted by the General Assembly, the Security Council and the Economic and Social Council, but rejected the proposal because of the cost involved. But fortunately Oceana has now come to the rescue, and has published the first of a series of 12-15 volumes of United Nations resolutions, grouped in four sub-series. The first sub-series will consist of resolutions of the General Assembly; subsequent sub-series will deal with the resolutions of the Security Council, the Economic and Social Council and the Trusteeship Council respectively. Within each sub-series the resolutions will be printed in chronological order.



In this first volume the resolutions are reproduced photographically in English (in the case of resolutions adopted in the first two months of 1946) or in English and French (in the case of resolutions adopted subsequently). Cross-references have been added in footnotes, and the volume is prefaced with the voting figures for each resolution, and, where a roll-call vote was taken on a resolution or on any part of a resolution, a country-by-country breakdown. There is also a topical index, which is only 2¼ pages long and far from adequate; for instance, the heading 'international law and registration of treaties' is not broken down into sub-headings, and the heading 'specialized agencies' includes references to U.N.I.C.E.F. and U.N.R.R.A., which are not specialized agencies. It is to be hoped that the cumulative index which is promised at the end of each sub-series will be fuller and more precise. A well-indexed collection of United Nations resolutions will be an invaluable research tool; a badly indexed collection will add little to existing publications such as the *Official Records* or the *Yearbooks of the United Nations*.

Several resolutions have annexes containing interesting background material. In addition, there are fourteen appendices at the back of the volume containing additional background material. These appendices fall between two stools; they are not copious enough to provide the reader with more than a limited insight into a few of the resolutions printed in this volume, and yet they are long enough to occupy a quarter of the volume. Judging by the price of the first volume, the entire series will be very expensive: omission of the appendices would have had only a very slight effect on the usefulness of the series, but it would have reduced costs considerably.

MICHAEL AKEHURST

*The Law of the Sea—Current Problems.* By RENÉ-JEAN DUPUY. Dobbs Ferry, New York: Oceana Publications; Leyden: A. W. Sijthoff, 1974. xiii+210 pp. Dfl. 42.

The current 're-thinking' of the international law of the sea has led to a vast literature, some of it reviewing the law as it is (or as it used to be), and some of it speculating on the law as it might become. This book, written by an eminent French jurist, is a combination of the two approaches.

The volume is divided into three parts. The first deals with general problems such as the sea as the 'common heritage of mankind' and the national appropriation of maritime areas. The second part deals with seabed problems such as strategic use, living resources and management of mineral resources. The third and final part touches certain regional problems, particularly in relation to the Mediterranean and the Caribbean. A select bibliography of recent publications completes the work, which lacks an analytical index.

The book appears from internal evidence to have been completed for publication in mid-1973 but it is indicated that the whole of the third part and most of the second part consist largely of material prepared in 1971 and 1972. As such, these sections are to some extent 'dated' in view of the continuous activity, in the form of State practice and speculative proposals, which has marked the seventies.

It is, therefore, the first part which is of most interest to the reviewer. Here, Professor Dupuy sees four 'principles of dialectical tension' in the law of the sea. First, this law, once concerned only with navigation, is becoming pluridimensional with increasing emphasis on the underwater environment. Secondly, it is moving from movement to appropriation. Thirdly, it used to be a law of a personal character in which sovereignty had little place, whereas now it is becoming a law of a territorial character. Lastly, it is moving away from universality towards regional situations.

Later in the first part, the author points out that the economic potential of the 'common heritage of mankind'—a concept he describes as a 'fruitful myth'—is already being diminished by the extension of national jurisdiction in the form of patrimonial and even 'matrimonial' seas. This latter concept is described as the recognition of an undivided

property in the area among coastal States together with the establishment of a communal agency. The emphasis on regionalism runs through the book. In the preface the author contends that if the law of the sea has to enunciate universal rules in the interest of all peoples, it must also provide for a certain amount of decentralization to take regional situations into account. At the present time, two years after Professor Dupuy wrote those words, it is still not clear how a reconciliation of the two ideas can take place.

GEOFFREY MARSTON

*Cyprus 1958-1967*. By THOMAS EHRLICH. London: Oxford University Press, 1974. xii+164 pp. £1 (paper).

This short monograph has been published under the auspices of the American Society of International Law and is the product of one of its study groups concerned with international crises and the role of law. It is concerned with the British decision to relinquish sovereignty, the Cypriot desire in 1963 for revision of the Zürich-London settlement which brought the United Nations into direct contact with the island, the Turkish decision to bomb in 1964, and the Greek decision to withdraw troops in 1967. 'The primary focus of this analysis is the role of legal norms and institutions in each government's decision-making process. Within that framework, the study is particularly concerned with how law was brought to bear by foreign governments and international institutions on national decision-makers' (p. 3).

Professor Ehrlich concedes that some of his judgments about the perceptions of participants as to what constituted legal norms might be wrong, but one might question whether there is any basis for his suggestion that '“Self-determination” is a legal norm embodied in the United Nations Charter', while agreeing with his further comment that it is such in so far as 'many resolutions of its constituent bodies' are concerned (p. 4). With respect, it is submitted that he tends to fuse the Charter with the United Nations and its *corpus* of law, and appears to interpret the purposes in Article 1 of the Charter as if they were principles in Article 2.

Dr. Ehrlich's account is highly descriptive—and the anti-British bias very marked (e.g. p. 25; and see his description of the role of the European Commission on Human Rights, pp. 30-1)—so that although this is described as a study of an international crisis and the role of law, the legal aspects are somewhat reduced in significance. However, he does refer to the legal influences at work, even though one might at times quarrel with his interpretations. He points out that for a long time Britain referred to the protection it enjoyed under Article 2 (7), but he maintains that 'the argument that an issue is not a matter of international concern is difficult to maintain in an international body. The very fact that the problem has been raised in that forum lends weight to the contention that it is more than a matter of one nation's domestic policy' (pp. 23-4). This ignores the fact that the United Nations is a political body, with States represented by politicians who do everything in accordance with political need, even though they may seek to place it under the umbrella of legal 'right'. Moreover, it opens the door to any member abusing the Charter and the rights of another State by internationalizing an issue by the simple process of raising it in the organization. What would then be the significance of Article 2 (7)?

The political approach of Dr. Ehrlich comes through time and again, and frequently obscures the rules of international law, at least as traditionally understood. Thus, he states that 'the argument that a consensual agreement estops the signatories from objecting to its terms does not run to the peoples subject to that agreement who had no voice in negotiating its terms' (pp. 25-6). He does not discuss whether this is true of the population of any country the government of which has freely entered into an agreement affecting the rights of that population. Further, he is not over-scrupulous in assessing purely political activities as if they were legal processes, particularly if he believes that



such activities might have caused one of the parties, e.g. Britain (p. 35), to shift its stance in any way.

The author adopts a somewhat similar approach to all four problems he examines. But one might ask what is to be gained from the point of view of analysing the role of law—unless it be for reasons of pure academic speculation—when he writes, in connection with the events of 1963, ‘to the extent that the analysis has value, it is to indicate the *kinds* of ways in which law *could have* been significant in the decision-making process’ (p. 41)? Similarly, when discussing the Turkish bombing he tends to look at the legal arguments that might have been put forward on both sides, but seems to agree ultimately with those who consider that Turkey considered her own interests and those of the Turkish minority in deciding to bomb and then to terminate the attacks. A realist or any student of power politics is aware of the fact that law played little role in the decision by Greece to withdraw its troops in 1967. Dr. Ehrlich examines this issue in order to support his thesis that ‘law provided both a framework for Turkey’s insistence that Greece reaffirm the 1960 Accords by withdrawing its excess forces and also a mechanism for Greece to accede to Turkey without being humiliated and without armed conflict’ (pp. 90–1). There can be little doubt, however, that this would have been the end result, even had there been no law under which to dress the facts of power and of politics.

For those who are seeking the extent to which law affected the four crises mentioned in this pamphlet as affecting the question of Cyprus, Dr. Ehrlich’s analysis is but half the story. To the extent that law could and might have played a role, it is a little different. For graduate students seeking a method of approaching dynamic political issues in order to show the relevance of international law, this examination of *Cyprus 1958–1967* may serve as a model, for ‘each decision was examined in an effort to isolate the ways in which law was involved or, absent records, in which such involvement appeared probable. From this analysis a picture has emerged of “how” law related to the decision, though “how much” remains uncertain’ (p. 117).

L. C. GREEN

*Der Streit um Gibraltar.* By HANS EISEMANN. Cologne: Peter Hanstein Verlag GmbH, 1974. 338 pp. DM. 58.

This thesis, written under the supervision of Professor Seidl-Hohenveldern of the University of Cologne, is devoted to a subject that is obviously of great interest to the United Kingdom and therefore deserves to be mentioned in these pages. Two aspects of the problem of Gibraltar are clearly and attractively dealt with. In the first place the author investigates the impact of the ‘right’ of self-determination. He concludes that it cannot justify Spain’s claim to Gibraltar. Indeed, he has the courage and is a sufficiently clear-headed lawyer to assert that self-determination is a political aim rather than a legal right. Secondly, he poses the question whether the *clausula rebus sic stantibus* is capable of destroying Britain’s title based on the Treaty of Utrecht. He denies the existence of a general principle as well as the existence of a fundamental change—a result which in the light of the decision of the International Court of Justice in the *Fisheries Jurisdiction* case (*I.C.J. Reports*, 1973, p. 18) is clearly right. That decision affords a most welcome and wholly traditional clarification. Dr. Eisemann’s work was concluded before its promulgation.

F. A. MANN

*The Modern Law of Treaties.* By T. O. ELIAS. Dobbs Ferry, New York: Oceana Publications and Leyden: A. W. Sijthoff, 1974. 272 pp. (including text of the Convention, bibliography and index). Dfl. 49.

The author of this book on the Vienna Convention on the Law of Treaties has been closely associated with its preparation both in the International Law Commission and



at the Conference stage. His treatise should therefore attract interest from anybody who wishes to gain first-hand information on the Convention's history. The book follows the general organization of the Convention, much in the way of a commentary. It offers some information on the draft of the Commission, amendments suggested at the Conference and the text eventually adopted, together with some of the pertinent practice of the Permanent Court and the International Court. Anybody interested in more detailed information on its *travaux préparatoires* will, however, still find Rosenne's source book indispensable. The author makes relatively little use of the prolific literature on the subject, and mainly relies on his personal knowledge instead. As must be expected from a slim volume on such a vast subject, there is not much room for any of the detailed questions surrounding the various provisions of the Convention. The reproduction and paraphrasing of the Convention's text itself often occupies a considerable portion of the available space. The sections on reservations, territorial scope and third States receive somewhat more extensive attention. The treatment of an interesting dispute between France and Nigeria in 1961 on the continued application of a treaty concluded between Great Britain and France unfortunately only presents the Nigerian view in any detail.

Although one could have wished for a somewhat more critical evaluation of the various provisions, the book presents a useful first introduction to the law of the Convention.

CHRISTOPH H. SCHREUER

*The Vietnam War and International Law: The Widening Context.* Edited by RICHARD A. FALK. Princeton, N.J.: The University Press, 1972. xi+951 pp. Hardback £12.50; paperback £4.75.

This is the third in a sequence of volumes sponsored by the Civil War Panel of the American Society of International Law and devoted to legal issues of the Vietnam war. It follows the pattern established by earlier volumes. The writings of some forty distinguished contributors are collected within its pages together with documentary appendices which relate to the issues discussed in the text. The widening context of the volume's subtitle refers not only to the expansion of hostilities in South East Asia but also to the increasing impact of those hostilities on internal affairs in the United States.

Those contributions which are concerned with international legal issues explore two principal themes: the United States incursion into Cambodia and the Son My massacre. The first of these themes is treated initially as an indicator of the probable extension of the conflict from Vietnam to other South East Asian States, a prophecy which more recent events in Cambodia and Laos have amply confirmed. The legality under the rules of international law of the incursion into Cambodia is then debated by a series of contributors embracing a range of differing views. The Son My incident is discussed in the context of the law on war crimes and individual responsibility and is reviewed against the background of the Nuremberg Principles of which the United States was one of the leading advocates. Ancillary to these major themes the volume also contains contributions on the legal status of the Revolutionary Government of South Vietnam, the prospects for settlement as they appeared at the time and the problems for international order posed by local conflicts of the Vietnam type.

The other concern of this volume is the domestic impact of the United States involvement in South East Asia. One group of contributors deals with the constitutionality of the incursion into Cambodia. Another discusses the attitude which should be adopted by United States courts to conscientious objectors who plead the so-called 'Nuremberg defense'. A major section of the volume is also devoted to broader constitutional issues arising out of the Vietnam war in terms of the distribution of functions in matters of war and peace between the separate branches of government in the United States.

Although this volume is being reviewed some time after the events it deals with took place, and after United States withdrawal from Vietnam, it cannot be dismissed as so

much water under the bridge. It is of continuing value not only as a repository of views on aspects of the Vietnam war itself but also as an important contribution to the understanding of some perennial questions of international and constitutional law. What is meant by the right of self-defence and when does it justify the crossing of an international frontier? Where should the line be drawn between legitimate military operations and the commission of war crimes? Are national courts appropriate and acceptable agencies for the application of the rules of international law? What is the status of an insurgent regime under international law? In a democratic society how can the governmental powers of war and peace be satisfactorily distributed and exercised? The Vietnam conflict focuses attention on these questions and provides a framework within which they may be reconsidered. It is not the aim of this book to supply the answers to those questions but to give a balanced presentation of opposed views. This it does and thereby provides a stimulus towards a better understanding of some of the most important issues in contemporary international law.

J. W. BRIDGE

*International Organization: Law in Movement. Essays in Honour of John McMahon.* Edited by J. E. S. FAWCETT and ROSALYN HIGGINS. London: Oxford University Press (for Chatham House), 1974. x+182 pp. £2.75.

International lawyers must feel grateful to all those who made the publication of this book possible. The untimely death of John McMahon, Fellow of Hertford College, Oxford, was a great loss. 'He had begun so well, and his work held so much promise', observes Dr. Higgins (p. 38). The essays here collected are a well-chosen form of tribute paid to his memory. They concentrate on problems which interested John McMahon either as a scholar or as a Legal Officer at the United Nations.

The book begins with an appreciation of John McMahon written by P. J. Allott and with a reprint of an article by McMahon himself on 'The Court of the European Communities: Judicial Interpretation and International Organization', both published earlier in this *Year Book*, 1968-9 and 1961, respectively. Then follow the contributions by McMahon's friends and colleagues.

Dr. Brownlie writes about 'The United Nations as a Form of Government' (pp. 26-36). Without defending the idea of turning the world organization into a world State, he says that 'the United Nations and national governments have much in common'. It is around this theme that he briefly discusses the universality, the discretionary element, some incompatibilities among the objectives, changes in the constitutional structure, consensus, and the role of the Great Powers in the United Nations. He states that '[m]uch comment in the press of the developed States on the "ineffectiveness" and "paper resolutions" of the Organization stems from a feeling that for the first time, in the economic and social sphere particularly, the United Nations is the institutionalized form of the world beyond the Foreign Offices and immediate influence of the Great Powers'. It may be added that institutionalization in certain fields preceded the United Nations, e.g. in the I.L.O.

'The Desirability of Third-Party Adjudication: Conventional Wisdom or Continuing Truth' is the subject of the paper by Dr. Higgins (pp. 37-52). The learned writer recognizes the political function of adjudication: 'legal decisions have their proper place in the political arrangement of things' (p. 42). One readily agrees with her rejection of some of the current arguments which are often adduced, without actual foundation, against judicial settlement. On the other hand, there are spheres which a court of law is less competent to enter, e.g. fact-finding (p. 45). The International Court of Justice, in contradistinction to its pre-1945 predecessor, has faced some unresolved difficulties involving compliance with its decisions. Consent, the writer emphasizes, still remains the key to this problem (pp. 47-9). One of the conclusions is that adjudication is not 'a desirable goal in certain types of conflict' (p. 52).



Professor Schachter's long association with the United Nations and his thorough knowledge of the internal workings of the Organization make the reading of his article particularly interesting ('Some Reflections on International Officialdom', pp. 53-63). He points to the various obstacles that stand in the way of an international secretariat, making it difficult to achieve an impact on the attitudes of States. Yet a multi-partisan and multi-ideological group has a chance of influencing national policies, for there is 'the need for more comprehensive and better integrated approaches to problems previously dealt with in separate discrete segments' (p. 62). These are, especially, the under-development of many countries and environmental deterioration. And the staffs of global institutions are qualified to seek solutions on a global basis.

Professor de Smith takes up the subject of mini-States and political emancipation of minute colonial and trust territories ('Exceeding Small', pp. 64-78). He discusses the question of associate membership in the United Nations. Then more space is devoted to decolonization of territorial units which have very small populations and are practically without resources that would permit them a fully independent existence. A sober approach to the problem is one of the virtues of this paper.

Peace-keeping operations are analysed by A. J. Jacovides, Minister Plenipotentiary of Cyprus, who gives the reader 'A View from Within: the Role of the Small States and the Cyprus Experience' (pp. 79-102). He comments on the U.N.F.I.CYP. against the background of earlier peace-keeping operations and draws some general conclusions for future actions of this type. The essay was written before the Cyprus crisis of 1974. The reader might wonder whether the writer's assessment on p. 98 was not too optimistic and, in particular, whether the presence of a larger United Nations force would have excluded the Turkish landing. (Probably not; on the other hand, it is more possible that the 'power vacuum' to which the writer refers and which arose in 1974, could have been forestalled by the British troops, had they left their bases and moved up north.)

Finally, there is a well-documented and thorough analysis of the 'International Control of Marine Pollution' by Michael Hardy (pp. 103-41). By way of a succinct presentation he introduces the reader to the main forms of marine pollution and the international law on the subject. That law suffers in most cases from lack of adequate means of enforcement (p. 111). So far marine pollution has been treated as a series of particular hazards and, consequently, there have been a number of specialized solutions (p. 137). The writer emphasizes the importance of, and the need for, an over-all approach where the fight against the pollution of the seas becomes part of the maintenance of the environment as a whole (pp. 136-7). The chances of that approach increase with the possibility of 'some change on a fairly large scale in the law of the sea and its institutions' (p. 137). Yet the place of marine pollution in the totality of ocean problems still remains to be determined. He emphasizes the necessity of an ocean surveillance system. Equally, technical and regulatory means should be elaborated to prevent and to control pollution caused by man, while principles and rules governing liability and reparation should be laid down (pp. 137-40).

The book merits high praise and should be read by any student of the law of international organization.

K. SKUBISZEWSKI

*Die internationale Konzession.* By PETER FISCHER. *Forschungen aus Staat und Recht* edited by G. Winkler and W. Antonioli, vol. 27. Vienna and New York: Springer Verlag, 1974. xxi+594 pp. With an English Summary. AS. 1180 (DM. 165, \$67.40).

This book is a welcome contribution to the debate on the role of non-State entities in the international sphere, which has recently culminated in the activities of the United Nations Economic and Social Council concerning multinational corporations. The study



offers a systematic analysis of a large number of concession agreements, mainly for the exploitation of oil resources, including a considerable number of hitherto unpublished documents. It presents difficult and intractable material in an easily accessible way. Although some of the facts are in the process of being overtaken by later events—the work was completed by mid-1973—the book offers valuable insights into the development of the relationship between oil exporting countries and foreign companies. Among the most interesting aspects is probably the increasing trend towards new modes of co-operation between concessionaire and receiving State in which the latter assumes more immediate control over activities without the spectacular method of nationalization. The decisive role of O.P.E.C. in negotiations and a tendency towards multilateral arrangements is also well illustrated. Moreover Dr. Fischer presents a considerable amount of persuasive evidence for the truly international or transnational character of the legal relationships arising from concession agreements between States and foreign companies. Anybody who still needs to be convinced that international law is not just a matter between governments should find it instructive.

The author follows a traditional approach with an inclination to dwell on historical examples. The largely descriptive nature of the study, which is undertaken with an emphasis upon logic and conceptual distinctions, indicates a strong influence by the Vienna school of legal thought. Some readers will therefore find the focus on the provisions of concession agreements a bit narrow and will miss a more comprehensive analysis of the role of multinational corporations, the power structure between the parties to the agreements, their practical operation and their impact on the development of national economies.

Despite these limitations, this study is a valuable tool and source of information for scholars, practitioners and businessmen. The English reader should resist the temptation to judge it by the appended English summary. Its brevity and language do not do justice to this well-written and informative book. A list of about 750 concession agreements from 1492 till 1973 is conveniently appended to the volume.

CHRISTOPH H. SCHREUER

*Tin: The Working of a Commodity Agreement.* By WILLIAM FOX, O.B.E. London: Mining Journal Books, Ltd., 1974. xiii+418 pp. (including appendices, bibliography and index). £9.25 (postage paid).

Mr. Fox was Secretary of the International Tin Council from 1956 to 1971, thus overlapping the first three International Tin Agreements. The book covers the working of the first four Agreements. Mr. Fox is not a lawyer but his clear and careful account of the problems of tin control and purchase is of value to those concerned with international organization and trade. The issues of commodity pricing have lately come to occupy a position near the centre of the stage.

IAN BROWNLIE

*The Future of the Oceans.* By W. FRIEDMANN. New York: George Braziller, 1971. 132 pp. \$5.95.

Professor Friedmann's interest was turning increasingly to the law of the sea when he was murdered, and that event is all the more sad to the community of international lawyers by reason of the promise of illuminating thought upon the subject contained in this essay, which is comparable in aim with that of Professor Andrassy, for whom Professor Friedmann wrote an introduction. In one respect, however, the subject-matter of Professor Friedmann's book is broader in scope and more frankly interdisciplinary in

character. Indeed it is not about the international law of the sea but rather about the policy issues concerning the law of the sea provoked by technological development. He gives figures—now somewhat dated—of the mineral and biological resources of the sea and details of the techniques becoming available for exploitation. Despite its limited size the work is always suggestive and perceptive. For example, the chapter on military and strategic uses of the seabed reveals an awareness which is infrequent outside defence circles of the naval implications of seabed policy. He not merely assumes the significance of the question but reveals an awareness of the purely naval argument whether acoustic arrays on the seabed are likely to prove only an ephemeral strategic necessity. There are dangers in this encapsulation of a technical defence issue in legal policy proposals: the suggestion that freedom to lay devices on the seabed may not be all that vital depends upon views about antiballistic missile defence at the time this book was written, which have now been overtaken by events. Legal policy should aim to keep all options open if it is to give effect to strategic considerations.

D. P. O'CONNELL

*Le Désarmement nucléaire.* By MARIE-FRANÇOISE FURET. Paris: Éditions A. Pedone, 1973. 226+(appendices and bibliography) 53 pp. Fr. 50.

Although there has been no nuclear war in the thirty years which have elapsed since the explosion of the first atomic bomb, an arms race of unprecedented dimensions has been the price paid for the precarious peace. Today, though the prospect of nuclear war appears to have receded, the development of new weapons systems threatens both the balance of power and the economic future of the major protagonists. If the world survives the next fifty years without the catastrophe of war, or a ruinous contest for weapons of inconceivable destructive power and fantastic expense, it will be because the United States and the Soviet Union have, together with those other States directly concerned, arrived at a true *modus vivendi* in the nuclear world.

At this crucial juncture it is useful to have Professor Furet's account of the path traversed so far. Beginning with the attempts to control nuclear weapons in the immediate postwar period, the author examines the various unsuccessful proposals put up in the West, notably the Baruch plan, and the lesser-known, but equally unsuccessful Soviet proposals. She shows how the rapid development of the hydrogen bomb impeded the prospects of agreement, after which the development of an independent nuclear capability by Britain, France and China complicated the picture further. The nuclear question is then seen to take its place as just one aspect of the question of general and complete disarmament, thereby raising a host of other problems.

This historical survey, which is full of interest, leads naturally into a discussion of the various treaties implementing the agreements which have been reached on special aspects of the nuclear question. After a brief examination of the treaty establishing the 'hot line', the Test Ban Treaty is examined at somewhat greater length. The treaty is rightly seen as a major achievement, though due note is taken of its shortcomings and somewhat elastic interpretation in practice. This is followed by an examination of the background and negotiation of the Non-Proliferation Treaty, in many ways the most important, as well as the most controversial of the treaties, dealing, as it does, with issues on which potential nuclear States are highly sensitive.

The treaties prohibiting nuclear weapons in Antarctica, in outer space, and in Latin America are then considered, together with the proposals for nuclear free zones in Africa and Central Europe. The final chapter in this section examines the recent treaty prohibiting the siting of nuclear weapons on the sea bed. Professor Furet argues that this, like the other treaties considered, can scarcely be considered a disarmament measure, and brings out very clearly the extent to which the final text was a compromise between the very different proposals of the United States and the Soviet Union.

In the final section the author discusses the recent treaties on the deployment of anti-missile systems and strategic weapons. Rightly, these are seen as agreements of limited scope but great symbolic importance. The 1973 Agreements on Basic Principles and the Prevention of Nuclear War emerged too late for inclusion but should, no doubt, be assessed similarly.

This is, then, a comprehensive and well-balanced survey of the field. The events and agreements described are put in their proper political context, though there is less discussion of the often equally important scientific side. Over all, however, the work achieves its aim of providing a concise synoptic view of the current situation.

The book is well written and well produced. There is a detailed table of contents but no index. The bibliography concentrates on works in French. Even so, it is surprising to note there is no mention of *Diplomats, Scientists and Politicians*, Jacobson and Stein's important work on the Test Ban Treaty.

J. G. MERRILLS

*Membership and Non-membership in the International Monetary Fund. A study in international law and organisation.* By JOSEPH GOLD. Washington, D.C.: International Monetary Fund, 1974. xiii+683 pp. \$10.

Joseph Gold, since 1946 a member of the legal staff and since 1960 the indefatigable General Counsel and Director of the Legal Department of the International Monetary Fund, has published his fourth monograph on the structure and the operations of the institution to which he has devoted decades of his life. It deals with the membership of the Fund, that is to say, with the pre-requisites and criteria of admission (Part I), the withdrawal from membership (Part II) and the relations with non-members (Part III). A final Part contains fifty-one paragraphs summarizing the conclusions which were developed in the course of the preceding twenty-three chapters. There follow eleven Appendices of more than 150 pages which include the text of the Articles of Agreement, and six 'Indexes'.

The experience of the Fund which Mr. Gold describes with such knowledge and care is no doubt of considerable importance for those interested in the practice of international organizations, though many aspects are peculiar to the Fund and the formulation of its Articles of Agreement. Mr. Gold has clearly succeeded in throwing light on many of the special problems to which the terms of the Fund's Articles of Agreement have given rise. One of the incidents which continues to merit interest is the expulsion of Czechoslovakia, described in great detail on pp. 345 et seq. Although the author is able to make new material available, some features of that incident remain unexplained. In discussing expulsion (or, as it is euphemistically called, compulsory withdrawal) Mr. Gold makes some observations which, within the framework of his academic work as a whole, are likely to come as a surprise. His writings have conveyed the impression that he was reluctant to admit any reason for criticizing the Fund, its members or the framers of its Constitution. He now mentions the 'conviction that the Articles are inadequate in some respects' (p. 341). That the par value system embodied in Article IV imposed obligations which have not been observed and, indeed, in times of crisis could not be observed now seems to be admitted (*ibid.*). So is the fact that the Fund was powerless and had to confine 'its attention to the preservation of as much order as is possible in an extra-legal system, and to the reform of those aspects of the original system that had become outworn' (p. 342). In other words, as the objective observer could not help noticing, the effectiveness of the Fund was in essential respects insufficient to withstand a crisis.

From the point of view of international law in general the results of Mr. Gold's investigations are perhaps less fruitful. Thus the author is at pains to emphasize that the Fund makes its own findings solely for its own purposes on whether an applicant is a 'country' or a body of persons is a government. This attitude is independent of any



recognition granted or withheld by members or other international organizations. The Fund's practice, therefore, does not contribute to the evolution of a general doctrine of recognition. One of the conclusions of the final chapter dealing with the Fund's objective international personality is that 'agreements with non-members or arrangements in which they participate must be consistent with the purposes of the Fund' (p. 484). Does the word 'must' indicate that in the event of inconsistency with the Fund's purposes the agreement would be *ultra vires* and therefore void? The answer should be in the negative and it may well be that the proposed limitation of the Fund's powers with reference to its purposes should be rejected (cf. this *Year Book*, 42 (1967), p. 145).

If it is the main function of this substantial volume to describe and analyse the practices of a particular organization adopted in implementation of its particular constitution, the question arises whether such a work is by its nature apt to teach valuable lessons to the international lawyer. It is likely to do so in so far as it indicates mistakes made in the past and suggests remedies for their prevention or indicates advantages of certain solutions to be followed on future occasions. The answer is less certain where the primacy of this object is not plain.

F. A. MANN

*The Major International Treaties 1914-1973. A History and Guide with Texts.* By J. A. S. GRENVILLE. London: Methuen and Co. Ltd., 1974. xxix+575 pp. (including index). Hard covers £7.90; paperback £3.95.

Professor Grenville is not a lawyer but a teacher and scholar concerned with modern diplomatic history. The lawyer knows of the specialist documentary collections and of the major series of treaties, such as that published by the League of Nations, but is grateful for the assistance of selective manuals. The one-volume collection prepared by Professor Grenville has no modern competitor and will make an excellent addition to a lawyer's library. Apart from the great labour of selection of treaties, the tracing of reliable texts has been a heavy task—and not less so in the case of some of the more recent texts. In addition to the texts themselves, the editorial matter sets forth much other useful information. The introduction contains a historian's view of the role of treaties, and of international law in general, in international relations.

IAN BROWNLIE

*Commentaire du règlement de la Cour internationale de justice. Interprétation et pratique.* By GENEVIÈVE GUYOMAR. Paris: Éditions A. Pedone, 1973. xix+535 pp. No price stated.

The revised Rules of the International Court of Justice entered into force on 1 September 1972, although the previous Rules (i.e. those adopted on 6 May 1946) continued to apply to a case such as the *Fisheries Jurisdiction* case between the United Kingdom and Iceland which was started by the United Kingdom Application deposited on 14 April 1972, even though Judgment on the Merits of the case was not rendered until 25 July 1974.<sup>1</sup> It will therefore be some time before much knowledge can be gained of the effect of the revised Rules, and commentaries such as this one will have to content themselves largely with a somewhat theoretical comparison of the new Rules with the previous ones. Commentators will, however, be entitled to speculate on the likely effect of the revision, basing themselves upon a careful analysis of the old Rules and the imperfections in those Rules which are alleged to have come about in the light of experience.

<sup>1</sup> *I.C.J. Reports*, 1974, p. 3. The same is true of the *Fisheries Jurisdiction* case between the Federal Republic of Germany and Iceland which was started by the German Application deposited on 5 June 1972 (*I.C.J. Reports*, 1974, p. 175).

This is in effect what Judge Eduardo Jiménez de Aréchaga did in a most learned and valuable article.<sup>1</sup> The author of the present work under review has, however, tended to refrain from such speculations, preferring to concentrate on a straightforward comparison of the two texts. Another feature of the present work is that considerably more emphasis is placed on the functioning of the Permanent Court than on that of the International Court of Justice, although this is attributable to the fact that more information is still available concerning the drafting of the former's Rules than of those of the latter.

As Dr. Guyomar explains in a brief introduction, the Permanent Court of International Justice was engaged, although in a somewhat leisurely fashion, in a more or less permanent examination of its Rules. The original Rules were adopted in 1922 and revisions, sometimes very minor but on two occasions fairly extensive, took place in 1925, 1926, 1927, 1931 and 1936. The International Court of Justice has, however, so far effected only one revision of its Rules.

In retrospect, the power of the International Court of Justice, enjoyed like that of its predecessor under Article 30 of the Statute, to draw up its own Rules appears as a fairly bold experiment in delegated international legislation. On the other hand this power is limited by the fact that the Court cannot introduce new Rules that might be deemed to be incompatible with the Statute. Amendment of the Statute itself is a difficult process and ultimately runs the risk of being blocked by the exercise of veto power in the Security Council, the Court's rights in the matter being no more than to propose amendments (Articles 69 and 70 of the Statute of the Court). An example of such limitation is contained in Article 43 of the Statute. This provides that 'the procedure shall consist of two parts: written and oral', that 'the written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies'; and that 'the oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates'. Basing itself on this provision the Court adopted Article 41 of its Rules in 1946 in such a manner as to give to the parties in a contentious case the right to a second written pleading. That right has now been removed, Article 44 of the revised Rules providing—in perfect conformity with the Statute—that, although, when a case is started by Application, each party shall normally file one written pleading only, 'the Court may authorize or direct that there shall be a Reply by the applicant and a Rejoinder by the respondent if the parties are so agreed, or if the Court decides, *proprio motu* or at the request of one of the parties, that these pleadings are necessary'. Article 45 of the revised Rules deals similarly with cases started by special agreement. But the Court has not felt entitled, even in the interest of speeding up the procedure, to go against the Statute and deny to a State in a contentious case its right to a day in court.

Much of the criticism which led the Court to revise its Rules was derived from the impression, largely false, that the Court was wont to drag its feet. Those more aware of the Court's ways recognize, however, that most of the blame for the delay that has occurred in some cases is to be attributed to the parties rather than to the Court. Nevertheless the Court itself does seem sometimes to have been at fault. This is demonstrated in an interesting article,<sup>2</sup> where the author criticizes the Court, first for having given Members of the United Nations the absurdly short time of fifty-nine days for the filing of written statements in the important Advisory Opinion on Namibia, and then for having taken ninety-six days over drafting its own Opinion after closure of the oral hearings.<sup>3</sup>

The Court, in confirmation of its own practice in the case of *Judgements of the Administrative Tribunal of the I.L.O. upon Complaints made against U.N.E.S.C.O.*,<sup>4</sup> seems to have decided once again that oral hearings may not be necessary in the case of an Advisory Opinion. This is because in such cases the Statute (Article 66) merely provides

<sup>1</sup> *American Journal of International Law*, 67 (1973), p. 1.

<sup>2</sup> W. M. Reisman, 'Accelerating Advisory Opinions: Critique and Proposal', *American Journal of International Law*, 68 (1974), p. 648.

<sup>3</sup> *I.C.J. Reports*, 1971, p. 16.

<sup>4</sup> *I.C.J. Reports*, 1956, p. 77.



that the Registrar shall notify those concerned that 'the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question'. In conformity with this provision Article 87 (2) of the revised Rules reads as follows: 'When the body authorized by or in accordance with the Charter of the United Nations to request an advisory opinion informs the Court that its request necessitates an urgent answer, or the Court finds that an early answer would be desirable, the Court shall take all necessary steps to accelerate the procedure . . .' Judge Jiménez de Aréchaga would appear to be correct in interpreting this to mean that in such cases the Court may at its discretion dispense with either the written or the oral proceedings.<sup>1</sup> Professor Reisman, however, is no less entitled to point to the danger of injustice inherent in unduly accelerated procedure, and the need to define acceptable criteria for acceleration.<sup>2</sup>

The revised Rules contain certain provisions designed to give the parties a choice in the composition of the *ad hoc* Chambers and thus, presumably, to make the use of such Chambers by States more likely. The supposed advantage is that States can in effect establish something like an arbitration tribunal, which could sit elsewhere than at The Hague and only the president of which would have to be a member of the Court, chosen jointly of course by the parties; and can then charge the whole operation on the budget of the Court instead of having to pay for it themselves. A degree of scepticism seems justifiable as to whether this aim will in fact be achieved; and also as to whether this intermingling of arbitration and judicial settlement is desirable.

The most important change effected by the revision is the suppression of the general right which the Court gave itself in Article 62 (5) of its previous Rules either to uphold a preliminary objection or to reject it or to *join the objection to the merits*. This is modified in Article 67 (7) of the new Rules as follows: 'After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character.' The supposed mischief here was twofold: first, it encouraged the respondent party to bring forward as preliminary objections defences which properly belonged to the merits, and secondly, it made it too easy for the Court to give an indecisive judgment at the conclusion of an unduly protracted preliminary phase. A notorious example of this is said to have been the *Barcelona Traction* case where, according to one point of view, the Court ought to have upheld, in 1964, the objection that finally prevailed in 1970, namely the objection that Belgium lacked *jus standi* in the proceedings.<sup>3</sup>

The circumstances that give rise to preliminary objections are so varied that it is extremely difficult to draft a rule of procedure that will eliminate all anomalies. Nevertheless, it seems permissible to give a cautious welcome to the new rule which may be expected to have the effect of making respondent States slightly less likely to bring forward preliminary objections. If this occurs, the preliminary phase will either be avoided altogether or will be abbreviated and this result would seem to have been achieved without making it any more difficult to put forward as preliminary objections pleas that are clearly and unmistakably preliminary. The new rule should be read in conjunction with Article 57 (1) of the revised Rules which, incorporating a reform that has often been urged by common lawyers who have appeared before the Court, reads as follows: 'The Court may at any time prior to or during the hearing indicate any points or issues to which it would like the parties specially to address themselves, or on which there has been sufficient argument.' Also to be noted is Article 56 (1) of the revised Rules, which reads: 'The oral statements made on behalf of each party shall be as succinct as possible within the limits of what is requisite for the adequate presentation of that party's contentions at the hearing. Accordingly, they shall be directed to the essential issues that

<sup>1</sup> Op. cit. (above, p. 467 n. 1), p. 10.

<sup>2</sup> Op. cit. (above, p. 467 n. 2), pp. 660-9.

<sup>3</sup> See *I.C.J. Reports*, 1964, p. 6, and *I.C.J. Reports*, 1970, p. 3.



divide the parties and shall not go over the whole ground covered by the written pleadings, nor simply repeat the facts and arguments these contain.' Taken together, these rules seem to give the President of the Court much more control over oral hearings than he had before, and, in the case of a preliminary objection that to some extent enters upon the merits, the President will now have the right to direct the party concerned to concentrate solely on establishing the preliminary character of the objection.

It is clear that, the Court having been alerted to certain alleged defects in its rules of procedure and having made a conscientious attempt to improve the position, counsel appearing before the Court in the future are going to have to pay considerable respect to the new rules. There has undoubtedly in the past been a tendency to treat some rules somewhat casually, as for example in the belated production of documents or in the practice, now successfully blocked by Article 56 (2),<sup>1</sup> of applicant States seeking in effect to secure a third round of oral argument by delaying the presentation of their final submissions until after the respondents had finished stating their case. The informative, methodical, well-documented research of Dr. Guyomar will be found invaluable by counsel, although, as already indicated, if enlightenment is desired as to the probable effect of the new rules or as to their justification, it is more worthwhile to refer to the shorter but more penetrating contributions of Judge Jiménez de Aréchaga and Professor Reisman.

D. H. N. JOHNSON

*Foreign Affairs and the Constitution.* By LOUIS HENKIN. Mineola, New York: The Foundation Press, 1972. xi+553 pp. \$11.50.

*Supreme Court und Politik in den U.S.A.* By WALTER HALLER. Berne: Verlag Stämpfli & Cie. A.G., 1972. xxvi+384 pp. Swiss Francs 65.00.

In so far as these two books deal with the constitutional law of the United States they are not of direct interest to the specialist readers of this *Year Book*. In particular, although Professor Henkin's work concentrates on foreign affairs, it very largely considers them within the context of the domestic law of the United States. Thus he discusses the sources of the constitutional power over foreign affairs (Chapter I) and then, after analysing the inter-relationship of the powers of the President and Congress in general (Chapters II to IV), explores the problem specifically in regard to treaties and other international agreements (Chapters V to VII). Finally, he turns to the effect of the conduct of foreign affairs upon the judiciary, the States and the individual (Chapters VIII to X). The learned author's searching account throughout displays academic detachment and impressive insight and, in contrast to many recent American publications on the subject, makes agreeable and instructive reading; it is, as a recent critic has reminded us, the style of this *Year Book* and the best of legal writing.

Dr. Haller is a Swiss scholar whose work also primarily contemplates constitutional law, albeit of a slightly different kind. His main interest lies in that fascinating problem, viz. the exemption of certain matters such as the political question from justiciability. The author's work states the law on the subject which in the United States seems to have failed to attract the academic attention it deserves, but to which not long ago a German author devoted a remarkable book (F. W. Scharpf, *Grenzen der richterlichen Verantwortung*, 1965), a summary of which was helpfully published in English (*Yale Law Journal*, 75 (1965-6), p. 517). On the other hand Dr. Haller exceeds the scope of Professor Henkin's work in that he pursues the political question in all its emanations, that is to say, without limitation to foreign affairs.

<sup>1</sup> This reads as follows: 'At the conclusion of the last statement made by a party at the hearing, its agent shall read that party's final submissions, without recapitulation of the arguments. Written copies of these, signed by the agent, shall at the same time be communicated to the Court and to the other party.'

What concerns the international lawyer most is the attitude of the courts towards the political question in the field of foreign affairs. Professor Henkin devotes nineteen pages (205 to 224) to it, Dr. Haller about forty (198 to 239). The former can afford to be short, for he has discussed the problem in the *American Journal of International Law*, 63 (1969), p. 284 and the *Columbia Law Review*, 64 (1964), p. 805. Yet one cannot help feeling that the author who aims at much more than a mere report could have carried his research a little further, for instance on so vital a topic as *Sabbatino* about which he does not say much more than that it 'establishes foreign affairs as a domain in which federal courts can make law with supremacy' (p. 219). There may be some who were under the impression that *Sabbatino* resulted in precluding the courts from making or applying law in the sphere of foreign affairs.

In the end, therefore, while both books are indubitably instructive and valuable, they do not contribute much that is new to the great problem of the independence of the courts when they are faced with aspects of foreign affairs. It is a problem which in the nature of things arises everywhere and on which guidance is badly needed. Professor Louis Jaffe's *Judicial Aspects of Foreign Relations* (1933), which curiously enough does not seem to have been cited by Professor Henkin, is largely obsolete, but merits and demands a successor.

In conclusion a remark on a technical point. The text of Professor Henkin's book comprises 281 pages only. Pp. 287 to 505 contain the bulk of the notes, but there are more notes at the foot of almost every page. This is very inconvenient and unworthy of so important a book. Notes should not be separated from the text which they support and amplify.

F. A. MANN

*Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland.* By MEINHARD HILF. Berlin, Heidelberg and New York: Springer Verlag, 1973. xi+249 pp. DM. 68.

Although the title of this useful book refers to contracts generally, it is in fact the interpretation of multilingual treaties and the statutes incorporating them into the law of the Federal Republic of Germany that it is concerned with. It is an exhaustive and very competent study of a subject which in practice is liable to cause greater difficulty than the available judicial material leads one to expect. This will be apparent to anyone who realizes that between 1950 and 1969 the Federal Republic entered into no less than 602 bi- or multilingual treaties which were published in the Official Gazette and incorporated into German municipal law. The figure is additional to innumerable executive agreements which were not so published and therefore do not give rise to the problems primarily discussed by the author.

He has divided his book into five parts. After a short introduction he turns to the interpretation of multilingual treaties in public international law; Article 33 of the Vienna Draft Convention provides the focal point for the close analysis Dr. Hilf offers (pp. 20-115). The third part (pp. 116-87) contemplates the case of treaties which include a German text and call for interpretation by a German court, while the fourth part (pp. 188-219) deals with the municipal interpretation of treaties expressed in a non-German language, but translated into German. Finally, there follows a chapter (pp. 220-30) devoted to certain special cases, among them the European Common Market law which the author considers so peculiar as to exceed the scope of his work.

The results reached by him may be summarized shortly. If the German text is 'equally authoritative' the judge must have regard to the other versions, because the agreement of the Parties results from the totality of all texts; in particular it cannot be argued that in such a case each Party is bound only by the text in its own language. If the German version is described as a translation and this is in need of interpretation the original text



in the foreign language should prevail. If the German version is described as 'official text' or as 'official translation', and appears to have been approved by all Contracting Parties, the translated text will have to be given special weight.

All this makes good sense. Though the book intends to investigate public international law (Part 2) and German constitutional law (Parts 3 and 4), it contains much comparative material. The English lawyer who is frequently faced with identical problems will derive much benefit from Dr. Hilf's solid research.

F. A. MANN

*The New Law of the Sea: Influence of the Latin American States on Recent Developments of the Law of the Sea.* By KARIN HJERTONSSON. Leyden: A. W. Sijthoff; Stockholm: P. A. Norstedt & Söners Förlag, 1973. 187 pp. No price stated.

Mrs. Hjertonsson has produced a study of the law on coastal jurisdiction as it has emerged in Latin America and the impact of this development. She has had the advantage of residing in Santiago and New York during the preparation of the book which covers the period up to and including the spring 1973 session of the United Nations Seabed Committee. Coming at a time when the law of the sea is in a state of uncertainty in view of the Caracas Conference, it might be said against the book that it is of only ephemeral value. This, however, would not be a fair criticism.

Although the book contains numerous proof-reading errors and lacks a general index, it has the great merit of a clear and simple style. It falls into two parts of equal length; the first deals with the present policies of the Latin-American States as manifested by unilateral claims and collective regional resolutions while the second half analyses the effect of the Latin-American position on the present law of coastal jurisdiction and on its future development.

Mrs. Hjertonsson points out that there is, however, no single Latin-American policy but rather a number of group positions. Thus Brazil, Peru, Ecuador and Panama claim jurisdiction to 200 miles over both 'economic' functions, such as fishing and mineral exploitation, and 'non-economic' functions, such as navigation and overflight; Chile, El Salvador, Argentina and Uruguay, on the other hand, restrict to 12 miles their claims to non-economic functions and claim only economic functions between 12 and 200 miles; Colombia, Venezuela and Guyana, on the Caribbean coast, have not claimed such wide belts of jurisdiction. Despite these differences, the author sees in Latin-American practice a common link in the concept of functionalism in which a distinction is drawn between resource uses (fishing and mineral exploitation) and non-resource uses (navigation and overflight). Jurisdiction over resource uses may be claimed over a wider belt of adjacent sea and seabed ('patrimonial sea') than for non-resource uses ('territorial sea'), the extent of the powers varying according to regional standards and even criteria set by individual States.

In the second part of her book, Mrs. Hjertonsson has had the courage to discuss the effect of unilateral claims and regional resolutions on the formation of customary international law. If the Third Law of the Sea Conference fails to produce an acceptable text in treaty form this problem will cease to be academic and will indeed become one of world-wide importance. In seeking to answer the question what are the current rules of customary international law relating to coastal jurisdiction, the author accepts Professor McDougal's view that it is the tolerance of other States rather than the claim itself which creates the norm. Applying this view to world practice, she concludes that although such practice is tending towards the acceptance of resource jurisdiction beyond 12 miles there is still no 'general practice accepted as law' within the meaning of Article 38 (1) (b) of the Statute of the International Court of Justice; nor is a 12-mile maximum any longer a general customary rule as it has lost the quality of general recognition. Thus



faced with the absence of any general rule, the author discusses the idea that there may be only various particular rules as a result of which the Latin American claims are valid with respect to States recognizing them but invalid with respect to States not recognizing them. She submits, however, that the International Court is already free to uphold the 'patrimonial sea' concept even against non-recognizing States by applying 'equity', in its sense of justice, fairness and reasonableness, as a source of law under Article 38 (1) (c). She draws this argument from the Court's judgments in the *Anglo-Norwegian Fisheries* case and the *North Sea Continental Shelf* cases. The author goes on to argue that where, as here, there is no agreed international policy on the resource use of the sea and seabed the Court, in its task of balancing competing interests, is entitled to 'take the pulse' of the international community, which is in favour of an extension of jurisdiction.

Whether or not such an argument is doctrinally satisfying, Mrs. Hjertonsson's stimulating discussion of this basic problem of the sources of customary international law will remain of continuing interest.

GEOFFREY MARSTON

*The Bases of International Order. Essays in Honour of C. A. W. Manning.* Edited by ALAN JAMES. London: Oxford University Press, 1973. viii+218 pp. £3.50.

Those who study international law and those who study international relations do not always share a common view of the nature of international society. The view of most international lawyers is from the standpoint of order; the view of many exponents of international relations is from the standpoint of disorder. The existence of a measure of order in international relations was always one of the concerns of Professor C. A. W. Manning in whose honour this book has been written. It is, perhaps, not without significance that Manning's early training was in the law. He was for a time an Oxford law don and translated Hatschek's *Völkerrecht im Grundriss* as well as editing the 8th edition of Salmond's *Jurisprudence*. Although none of the contributions to this volume mentions it, it seems probable that Manning's conception of international order and of the significance of law in international relations owes something to his legal background.

The contributions to this book are all by former colleagues of Manning including a number who had been his students. They all accept as a basic premiss that international society can properly be described as ordered. But each makes an individual contribution since there is no common agreement on the concept of international order or on its contemporary significance.

The book opens with an essay by F. S. Northedge on the relation between order and change in international society. His analysis suggests that change in international relations has a momentum of its own which cannot easily be checked or diverted, but that it is possible to affect the impact which change has on international order. One of the most significant changes in recent years has taken the form of a wave of new States, and their impact on international order is the subject of an essay by Peter Lyon. He discusses the attitude of new States towards international order and concludes that it tends to be reformist and evolutionary rather than revolutionary. The contribution by Alan James is concerned with law and order in international society. He investigates the role of international law in the context of a number of concepts of international order. His theme is that the maxim *ubi societas ibi ius* applies to both domestic and international society and he is critical of those students of international relations who dismiss or overlook the role of international law. The next essay, by the late Martin Wight, approaches international order from the standpoint of the balance of power. The view is expressed that risks and sacrifices in the interests of maintaining a balance of power are historically justified in the

interests of international order. War and international order is the theme of an essay by Hedley Bull. He first considers the meaning of war and then discusses its function in the modern historical States system and in contemporary international politics. Geoffrey Stern then examines the relation between morality and international order. He assesses the contribution which international morality makes towards the maintenance of order and in particular the influence of morals on policy-making by States. An essay by Geoffrey Goodwin considers the contribution which world political institutions have made and may make to international order. His approach is by way of a critical analysis of the intellectual assumptions upon which attitudes to world peace are based, particularly in the context of notions of interdependence, collective security and the peacemaking role of the United Nations. The final essay, contributed by Michael Banks, assesses the contributions which Manning on the one hand and contemporary theorists on the other have made to understanding the bases of international order.

This volume is more than a gracious tribute to a distinguished British pioneer in the field of international relations. It provides a counterbalance to much contemporary writing which has concentrated on the turbulent and unpredictable nature of international relations. Through the unity of its theme and the diversity of its treatment it is an important contribution to the debate on the nature of contemporary international society.

J. W. BRIDGE

*Les Missions permanentes auprès des organisations internationales*, Vol. II. By N. KOHLHASE, F. A. M. ALTING VON GEUSAU, J. SIOTIS, P. GERBET and J.-V. LOUIS. Brussels: Établissements Émile Bruylant, 1973. 437 pp. Bfr. 2,300.

In the first volume of this series the activities of permanent missions in a wide range of international institutions were surveyed in a general way (see this *Year Book*, 46 (1972-3), p. 542). Now, with the exception of M. Gerbet who has contributed to both volumes, a new team of authors has produced a series of case studies of the part played by permanent missions in specific areas of organizational decision-making. As in the earlier volume, each author is responsible for his own section and as before investigation ranges widely.

For the British reader perhaps the most arresting section is M. Kohlhase's opening essay on the influence of permanent missions in the E.E.C., the O.E.C.D. and the I.L.O. The author focuses specifically on decisions relating to the budget of these organizations. After examining the character of financial decision-making in each institution, M. Kohlhase examines the changing role of the permanent mission in the process. Although the author's views on the likely development of the financial side of the E.E.C. have inevitably been overtaken by events, the role of the permanent mission is clearly a continuing one and his analysis of past trends provides some useful pointers to the future.

The O.E.C.D. features in two essays. M. Alting von Geusau considers the role of the permanent mission in co-ordinating institutional strategy and national policy, in an essay in which N.A.T.O. is also examined, and M. Gerbet the role of permanent representatives during the transition from O.E.E.C. to O.E.C.D. M. Siotis examines the permanent missions in U.N.C.T.A.D. with special reference to both its system of regional groups and the special problems of that organization. In the final essay M. Louis provides a detailed account of the preparations within the E.E.C. for the 1965 negotiation with Austria.

The contributions, though varying in length, are clear and concise. The book is well produced with a detailed table of contents instead of an index. For range and depth of analysis of issues that are both interesting and important the present work matches its predecessor.

J. G. MERRILLS



*U.N. General Assembly Resolutions: A Selection of the most important resolutions during the period 1949 through 1974 (Session I-XXVIII).* Compiled by KNUD KRAKAU, HENNING V. WEDEL, ANDREAS GOHMANN. Frankfurt am Main: Alfred Metzner Verlag G.m.b.H., 1975. xiii+442 pp. (including indices). DM.66.

This compilation is well done and of immense practical value. The resolutions are presented in their original language. The editorial material, which is confined to the necessary minimum, is in English and German, except for the quite substantial subject index, which is in English. There is also a numerical index and over all the apparatus and organization of the book are of a good standard. Although the title does not make the matter clear, the collection is intended primarily for the use of the lawyer. Some 300 resolutions are presented in a typography which is not too dense for easy reading. Sampling of the contents indicates a conventional and efficient selection of items.

IAN BROWNLIE

*The Organization of American States and the United Nations: Relations in the Peace and Security Field.* By AIDA LUISA LEVIN. A U.N.I.T.A.R. Regional Study No. 4. Peaceful Settlement No. 7. New York: United Nations Institute for Training and Research, 1974. 82+32 pp. (selected bibliography). \$4.00.

After the dissolution of the League of Nations and all through the nineteen-fifties there was debate about the relation of regionalism to universalism in the maintenance of international peace and security. Ever since, with the exception of the discussion around the Cuban missile crisis, the topic has aroused less attention. Dr. Levin's study is therefore a welcome addition to the literature concerning the relationship between the United Nations and regional arrangements. Since it appears in the U.N.I.T.A.R. series, it is understandable that the work is not very wide in range. This, however, may be seen as an advantage, because it has allowed Dr. Levin to introduce a new methodology.

Dr. Levin has taken the Organization of American States as an example of a regional arrangement. Her choice is justifiable, because the effectiveness of regional arrangements in the maintenance of peace and security has mostly been tested in connection with the O.A.S. The study of the O.A.S. is therefore a good illustration of the practical evolution of the relationship between regionalism and universalism as expressed in the United Nations Charter. The author points out that the objectives and principles of the two systems show a considerable similarity. The task of regional arrangements in the maintenance of peace and security is twofold: peaceful settlement of local disputes and enforcement action under the authority of the Security Council.

There have been only minor problems in the peaceful settlement of disputes within the framework of the O.A.S. as the Pact of Bogotá is well designed in this respect. The major difficulties have therefore arisen in the field of enforcement action which needs the authorization of the Security Council. Dr. Levin's study provides an interesting classification of constitutional issues between the United Nations and the O.A.S. in this connection. Her classification shows clearly the interplay between the universal and regional systems in the Western hemisphere. She concludes by stating that especially in relation to jurisdictional issues 'institutional jealousy' has been the cause of considerable ambiguity and confusion in the practices of the organizations involved.

The author makes it clear that there is a need to survey some of the differences between the United Nations and the O.A.S. in a study on regionalism and universalism. The O.A.S. does not have an organ wielding the powers of the Security Council. In addition the member States of the O.A.S. are equal in so far as each State has one vote and there



is no veto. It is also important to note as Dr. Levin points out, that the Secretary-General of the O.A.S. lacks the power of taking independent initiatives.

Dr. Levin indicates that since 1945 the trend in the Latin American countries has been towards a cooler approach to regionalism. The United Nations has begun to be seen as an alternative forum to counterbalance the powers of the United States in regional bodies. It is understandable that the membership of a great power in the O.A.S. has cast some doubts on the legitimacy of the organization in the eyes of some States in the United Nations. An example of a possible future development is the Special Commission on Latin-American Co-ordination (C.E.C.L.A.) whose membership is exclusively Latin-American. Many countries would be willing to see a plurality of ideologies represented in the O.A.S. At present, the O.A.S. and the United Nations are undergoing some transformations and it will be interesting to see what their relationship will be in the future.

ERKKI KOURULA

*Humanitarian Intervention and the United Nations.* Edited by RICHARD B. LILLICH. Charlottesville: University Press of Virginia, 1973. xii+240 pp. \$12.50.

This volume, in the Virginia Legal Studies series, is about one of the main controversial topics in international law, that of intervention by one State in the territory of another on humanitarian grounds. The principal, and finally unresolved, question posed is 'How far and in what circumstances is such intervention legal, or ever desirable in the present post-Charter period of international law?'

This question is presented in a variety of ways. Over half of the book is a transcript of the proceedings of a conference held at Charlottesville, Virginia, in March 1972, co-sponsored by the Procedural Aspects of International Law Institute and the Carnegie Endowment. The conference was attended by, mainly American, academic and government lawyers and its aims were to look at this topic and to recommend possible ways in which the 'United Nations might create or adapt institutions to govern the invocation and to regulate the use of coercive measures in humanitarian situations'. The transcript records a lively debate with a wide spectrum of views. In contrast to this record of spontaneous discussion two essays follow. The first, by a non-participant of the conference, Dr. I. Brownlie, argues the case against humanitarian intervention, while the second, by a participant, Professor Farer, attempts to summarize the conference's conclusions. Finally there are two appendices. One illustrates the problem in a factual setting by showing how the doctrine could have been utilized to protect the Ibos in Nigeria; the other complements all the preceding material in that it gives the views on forcible self-help put forward by States in the United Nations over the last decade. This last, along with the essay by Dr. Brownlie, prevents the book from presenting an almost exclusively American viewpoint and thus makes it of wider interest.

This compendium of sources means that there is collected together a good cross-section of the current opinions on the subject and highlights the main areas of dispute. It provides a useful approach to the established literature on humanitarian intervention which is chronicled in the bibliography.

The original title of the subject matter of the conference was 'Humanitarian Intervention through the United Nations'. The changed title illustrates the central dilemma. Article 2 (4) of the Charter denies the use of force against a State and Article 2 (7) forbids interference in the domestic affairs of a State. The only exceptions are Article 51 and Security Council action under Chapter VII. This last is only permissible in the event of a threat to the peace, breach of the peace or an act of aggression. Therefore, if a situation can be thus categorized the need for the doctrine of humanitarian intervention disappears. It is the situations that cannot be so described that cause the difficulties for in these cases the Security Council has no mandate to intervene. In any case it is now past

history that the Security Council has rarely been able to function as envisaged in Chapter VII. Thus if humanitarian intervention through the United Nations collective agencies is impossible can one individual State act unilaterally and have her actions classed as legal in the terms of the Charter? The problem today is that of 'Humanitarian intervention and the United Nations'. Are some human rights to be considered so fundamental that Articles 2 (4) and 2 (7) can be legitimately ignored in protecting or restoring them? Or should those articles be altered to allow a new exception relating to violation of human rights? The question of the validity of unilateral action can be approached in many ways, ranging from a complete denial of unilateral action to a complete sanctioning of it. The difficulties and dangers of both extremes were forcefully expressed at the conference. If unilateral action is denied then such events as those in 1971 in East Pakistan (as it then was) go unchecked in the face of the United Nations' inability to act. Proponents of this view must propose acceptable and viable alternatives to unilateral action. If on the other hand, State action is to become accepted as justifiable in law, it is open to abuse and so limits have to be clearly defined.

Such are the questions faced and explored in the book. Many suggestions are fully debated and some alternatives to unilateral action are put forward. However, the machinery which would be required to make such alternatives effective is not fully worked out. Professor Farer sums up the mood of the conference, and the book, when he says that in the fundamentals, in the desire to be able to take effective action there is agreement (except on the part of Dr. Quadri, a lawyer who presented the South American view at Charlottesville). Future discussion must centre upon precise conditions and limitations of such action.

CHRISTINE M. CHINKIN

*Lord McNair: Selected Papers and Bibliography*. Leyden: A. W. Sijthoff; Dobbs Ferry, New York: Oceana Publications Inc., 1974. xiii+395 pp. Dfl.70. \$30.50.

This work, to which Sir Gerald Fitzmaurice contributes a Foreword and Professor R. Y. Jennings an Introduction, arose from a general desire of the Faculty of Law of the University of Cambridge that a collection of Lord McNair's papers outside his main works (*International Law Opinions*, the *Law of Treaties*, the *Legal Effects of War* and the fourth edition of *Oppenheim*) should be brought together in an accessible form. As it turned out, the collection might well have been published in celebration of Lord McNair's ninetieth birthday—or, sadly, as a tribute to his memory, since his death took place soon after that event.

Well as the present reviewer knew Lord McNair, and despite the debt that he owes to him, he must resist the temptation to turn this review into another obituary notice. That duty has been performed by others more qualified, elsewhere.

In that context, it will be sufficient here to refer to Sir Gerald Fitzmaurice's Foreword where, in assessing Lord McNair's distinctive contribution to international law, Sir Gerald refers to Lord McNair's training as a common lawyer, and particularly as a solicitor; his early interest in the law of contract; his distrust of attempts to discover the rules of international law only by logical reasoning, or even the application of first principles; and his desire, on the contrary, to find in international law such elements as could be found of what he called 'hard law'. Lord McNair found these, as Sir Gerald puts it, 'in settled State practice, in arbitral and judicial precedent, in pieces of codification by treaty that had gained universal acceptance as law' (p. xii) and also, to some extent, in 'the general principles of law recognized by civilized nations'. With regard to this source, however, it will be recalled that in a much-quoted passage, Lord McNair said: 'the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and



institutions' (*International Status of South-West Africa case, I.C.J. Reports*, 1950, p. 99). This passage, and many others, justifies Sir Gerald's conclusion that, while Lord McNair held no particular brief for legal positivism, he also did not approve the powerful reaction against it which has developed in some quarters. If a personal memory may intrude, the key to Lord McNair's approach—in the present writer's view—is that he considered generalized propositions about international law to be of little value. What interested him were legal opinions expressed in relation to cases and issues that had arisen out of hard facts. This feature, rather than any chauvinistic pride in the infallibility of the English Law Officers, of whom he was often quite critical, explains why he attached so much importance to their Opinions, a source of international law in which naturally foreign observers could not be expected to place such confidence. On this point Sir Gerald Fitzmaurice rightly comments: 'These Opinions, if often somewhat oblivious of the finer points of legal theory, are almost invariably informed by the same robust common sense and feeling for what is practicable and viable as law that is characteristic of Lord McNair's own work' (p. xiii).

Professor Jennings's contribution to the volume is technically only an introduction to a bibliography, which sets out a long list of Lord McNair's works that are not reproduced in the volume, such as, for instance, his lectures delivered at The Hague Academy of International Law; biographical notices; articles on air law and Roman law, and so on. It is, of course, unfortunate that it was not found possible to reproduce some of these contributions in the volume itself. Non-British readers might have been particularly interested in having the text of Lord McNair's speeches in the House of Lords on the Suez Canal controversy on 12 September 1956, and on the Common Market on 1 August 1962, and, generally, in knowing more about Lord McNair's activities in public life as well as his remarkable achievement as both scholar and judge. Professor Jennings rightly says that 'what is so striking about this list is not just the excellence and importance of the individual works, but their range. The works comprise all the main branches of the legal writer's skills: historian, textual critic and editor, expositor and teacher' (p. 389).

Professor Jennings also refers to the volumes of the *Annual Digest of Public International Law Cases* (now *International Law Reports*), which Lord McNair started in partnership with Sir Hersch Lauterpacht, as having transformed 'the whole nature of international law by making the case law more easily available' (*ibid.*). There is possibly an element of exaggeration here: even so, the partnership between these two men, of such markedly different backgrounds, was a very fruitful one and represented an outstanding contribution to the science of international law by United Kingdom lawyers in the mid-twentieth century.

Coming to the selected papers themselves, this review can be comparatively brief. Most of the papers are already well known. The main subjects treated are nationality of corporations; treaties; servitudes; a number of problems arising out of the civil war in Spain; the seminal article on the debt of international law in Britain to the civil law and the civilians; and a number of articles about international adjudication and the teaching, reform and expansion of international law. Among such a varied list it is not easy to decide on which articles to comment. It has been felt appropriate, however, to append a few remarks on some contributions made by Lord McNair towards the end of his career, when he could reflect with mature wisdom on the experience of about half a century during which he had been concerned with international law.

In the *Ludwig Mond Lecture*, delivered at the University of Manchester in 1957, Lord McNair addressed his audience on the key question of 'The Place of Law and Tribunals in International Relations'. He was concerned in this lecture to develop the hardly original theory—although he did so with admirable lucidity—that there is a basic distinction between legal disputes and non-legal disputes; that is, between disputes as to rights and disputes in which, in a society which lacks a legislature, one party wishes to change the *status quo*. This led him to state the crucial problem of international relations as being 'to find some machinery for the purpose of bringing about changes in the



*status quo ante* by peaceful means' (p. 302). Lord McNair went on to consider the possibility of adjudication *ex aequo et bono* under Article 38 (2) of the Statute of the International Court of Justice but was sceptical about the utility of this method. The fact that it had been open to States for thirty-five years but had never once been tried was for him highly significant, the reason probably lying in its unpredictability. As one who had given advice on international disputes as well as deciding them, Lord McNair was well qualified to say, somewhat drily, 'Of course no person embarking on litigation can be sure of success, but at any rate he wishes to be in a position to obtain expert advice as to his prospects of success' (p. 306). He was opposed to judicial legislation by international judges and arbitrators, but he was in favour of arbitration of major disputes between Governments and foreign corporations.

In a series of lectures delivered at the Hebrew University of Jerusalem in 1962, Lord McNair showed himself cautiously sympathetic to new openings in international law such as the European Convention on Human Rights and the Conventions of the International Labour Organization, and concluded the series with a lecture entitled 'A Retrospect of Fifty Years of International Law'. He noted the progress made in that period through the transformation of international law 'from book-law to case-law'. The present writer has already expressed the view that there may be a tendency to attach too much importance to this 'transformation'. There is even much to be said for Professor Clive Parry's observation that 'it is impossible to resist the impression' that the process of making collections of municipal decisions upon questions of international law 'began with the thought, which was no doubt a perfectly proper sentiment at that time, that anything which looked like the judgment of a court and which related however remotely to international law, was worth collecting—for the worthy end of making international law look more like law than it had beforehand' (*The Sources and Evidences of International Law*, 1965, p. 13). Professor Parry's strictures, however, do not apply to the decisions of international tribunals, and Lord McNair was quite right to lay stress, also, on the contribution of the International Law Commission. On the broader aspect of the application and enforcement of international law as compared with its technical content, Lord McNair was less sanguine. The two most important steps that needed to be taken, in his view, were much wider acceptance of the compulsory jurisdiction of the International Court of Justice and the establishment, under the United Nations, of the nucleus of an international force and machinery for its expansion to deal with particular contingencies. With regard to this last point, it has to be remembered that this lecture was delivered in 1962, at a time when a fairly optimistic view prevailed concerning the achievements of the United Nations forces in the Suez Canal area and the Congo. A careful reading of the lecture reveals, however, that Lord McNair did not hold a naïve opinion concerning the potentiality of such forces. For him they were not so much an end in themselves, as a means to an end; the end being, of course, some means of settling 'non-legal controversies' which, as he never failed to point out, were not suitable for submission to international judicial or arbitral tribunals.

The Cambridge Law Faculty are to be congratulated upon bringing out this useful volume in honour of one of their most distinguished members.

D. H. N. JOHNSON

*Studies in International Law*. By F. A. MANN. Oxford: Clarendon Press, 1973. xxxii+717 pp. £7.00.

The first part (144 pages) of Dr. Mann's volume consists of his well-known 1964 Hague lectures on 'The Doctrine of Jurisdiction in International Law'. We have good reason to be grateful both to the author and the publisher for having made this learned survey available to the student in an edition additional to the *Recueil des Cours*. The volume also contains a collection of articles from yearbooks and law reviews which deal

mainly with private international law problems and the influence on that law of novel trends in inter-state commercial relations and other international transactions crossing the frontiers of countries as well as the borders of different academic disciplines. These articles include contributions to public international law and to constitutional law. American readers may take a particular interest in a study, reprinted from the *Transactions of the Grotius Society*, 1945, with the title 'Judiciary and executive in foreign affairs'. To the combined field of law and foreign affairs also belong two articles on 'The present legal status of Germany' dealing with situations that have changed since the articles were written.

A reviewer who is concerned with both public and private international law will take a natural interest in the author's views on the relationship between these two branches of law and their place in legal systematics. In this respect the Hague lectures are of particular interest. But before turning to them it must be recognized that other articles in *Studies in International Law* have great value because they raise new problems or suggest new solutions to old ones. This is the case with several articles where a choice of foreign public law is discussed as a matter of conflict law, e.g. 'International delinquencies before municipal tribunals', 'The sacrosanctity of foreign Acts of State' and 'The legal consequences of *Sabbatino*'.

The answer to the question of the relationship between public and private international law is given in the reprinted Hague lectures. After having stated (p. 10) that the function of jurisdiction is to allocate legislative competence to the State, Dr. Mann explains (p. 12) that public international law does not contain detailed rules regulating the application of this or that legal system, i.e. choice of law rules, and that 'the conflict rule is a rule of municipal law' (p. 13). On the same page he sums up what seems to be the position taken nowadays by most conflict lawyers: 'With the exception of some provisions in treaties and a few principles which have become generally recognized by civilized nations public international law includes no conflict rules.' However, at pp. 43 et seq., dealing with 'legislative jurisdiction' in the field of private international law, some jurisdictional limits are mentioned, which might not necessarily be supported by customary public international law and which would, if accepted as true law, have an impact on the law of conflicts. Some questions may also occur with respect to the *exposé* of criminal jurisdiction. Dr. Mann condemns the decision in the *Lotus* case (p. 23) and states (p. 25, note 2) that this case has 'been overruled' by Article 11 of the 1958 Convention on the High Seas. But it can very well be argued that Article 11 was not a codification of customary law, but a 'development' (good or bad), introducing a new rule, which became binding exclusively upon the parties to the Convention. It seems, to the present writer, doubtful whether such far-going rules on criminal jurisdiction as are presented on pp. 69–81 really have the support in State practice which can be said to be creative of customary international law.

Dr. Mann formulates and defends his points of view with both force and eloquence and he is thoroughly familiar with the legal literature in the fields of the two related, perhaps, but still dissimilar disciplines which are referred to in the title of the volume as 'international law'. The diversity of the opinions expressed in legal writing might, however, suggest that a summing up of the present customary rules of the law of nations with respect to jurisdiction—and not only 'legislative jurisdiction' but also judicial competence in civil and criminal matters—cannot be successfully based on what in Article 38 of the Statute of the International Court of Justice is called 'the teachings of the most highly qualified publicists of the various nations'. The primary source of the unwritten law is, according to the same article, 'international custom, as evidence of a general practice accepted as law'. The wording of this sentence may be ambiguous, but State practice must be the main source for efforts, public or private, to 'codify' public international law on subjects such as jurisdiction. And perhaps the existing controversies in legal writing and the hazards to international co-operation caused by conflicting approaches in national law can best be combated by more decisive efforts towards uniform law, if



such law be understood and enforced in the wise manner Dr. Mann advocates in 'The interpretation of uniform statutes', reproduced from the *Law Quarterly Review*, 1946, in his *Studies in International Law* (pp. 614 et seq).

HILDING EEK

*International Law: Law of Peace.* By N. A. MARYAN GREEN. London: Macdonald and Evans Ltd., 1973. 298 pp. £2.50.

In the last ten years there has been such a spate of one-volume texts on international law that it is with some misgiving, particularly as a teacher, that one opens Mr. Maryan Green's volume. It immediately distinguishes itself by its format from these other works. Succinct chapters are set out in large type with no footnotes and a minimum of reference to supporting authority in the body of the text. Not that the work is unbusiness-like; the chapters follow crisply the Model Plan for the Classification of Documents in the field of Public International Law recommended by resolution of the Council of Europe, there is a full index, a case list and a list of treaties (terminating with the Montreal Convention of 1971 on Hijacking) stating whether the treaty is in force and if so, how many States are parties to it. There is no bibliography (no invitation to the more industrious student to read further) and indeed a total absence of citation or cross reference to works of international writers. An uncertain proposition of law is introduced as one which 'most States practise' or 'the more normal approach' supports, or if it is more controversial, it is followed by 'some States and writers do not agree'. The rule of anonymity is broken only when discussing doctrine where Gidel, *Le Droit international public de la mer*, and Oppenheim, *International Law*, edited by Lauterpacht, are mentioned as subsidiary sources of law.

As to the substance of the book there is no equal originality of treatment to distinguish it from its peers save that one can recommend the bulk of the book to the general reader and to students of a first course on the subject as easily understood and generally profitable. This includes the introduction and exposition of sources, the examination of the individual's position in international law including his right to enter and leave his home and foreign territory and an invaluable concise account of recent developments in the field of human rights and self-determination, as well as the sections on the limits by land, sea and air of a State's sovereignty and jurisdiction (apart from a rather laboured distinction made of the *prohibitive* effect of international law on a State's *coercive* jurisdiction). Mr. Maryan Green is an international civil servant, familiar with continental as well as Anglo-American legal terminology and he undoubtedly has ability to draft in half a page a memorandum on any topic setting out the accepted legal position without irrelevancy or distracting detail. The clarity of his prose is a rarity among writers in the international field and the only obscurity comes from his use of a continental term of law in an English context.

It would appear that those areas which have concerned him most directly in his work are the most thoroughly and instructively presented, if with some resulting unevenness in length. Thus, an interesting section on the position of consuls occupies eight pages compared with a bare three on the International Court of Justice. The section on international organizations extends to twenty-five pages but is one of the most original in the book, as it outlines a law for international corporations as full as that offered in municipal law systems for companies and develops a doctrine of the legal effectiveness of international organizations derived from the concept in French law of an *acte*. It is to be regretted that the nature of the work prohibits any development in depth of these ideas.

The final section in Part V on State immunity also suffers by reason of space. Some controversial and highly theoretical remarks on immunity from a State's external and internal sovereignty are set out in a page and a half and presume a detailed knowledge of municipal case law on the recognition of governments.



The standard of accuracy of the material would seem to be high; and actual mistakes are few. At p. 216 Article 15 of the Geneva Convention on the High Seas is misleadingly quoted to give the impression that a mutiny of a crew can constitute piracy in relation to their own ship, and at p. 245 reparation for any form of damage is said to be recoverable though p. 260 more properly qualifies this statement. Omissions are inevitable in a work of this size but not glaring: there is no mention of an international regime for the deep seabed nor the principle of reciprocity which governs submissions to the compulsory jurisdiction of the International Court. The effect of war on title and treaty is also very sparingly treated but is, perhaps, reserved for a second volume on the *Law of War*.

These criticisms apart, the impact of Mr. Maryan Green's book is considerable. His bold statement in under 300 pages of the major rules of international law of peace brings home how much of this law is now well established and requires no authority to buttress it. It is both refreshing and encouraging to see the modern law stated so well.

HAZEL FOX

*Judicial Settlement of Disputes. An International Symposium.* Max Planck Institute for Comparative Public Law and International Law. Edited by HERMANN MOSLER and RUDOLF BERNHARDT. Berlin; Heidelberg; New York: Springer Verlag, 1974. xii+572 pp. DM.78.

The first part of the volume sets forth the oral reports presented and the discussions which ensued at a symposium which took place at the Max Planck Institute in Heidelberg in 1972. The three themes dealt with were: first, does the International Court of Justice, as it is presently shaped, correspond to the requirements which follow from its functions as the central judicial body of the world community?; secondly, to what extent and for which subject-matters is it advisable to create and develop special judicial bodies with a jurisdiction limited to certain regions or to certain subject matters?; thirdly, to what extent and for which questions is it advisable to provide for the settlement of international legal disputes by other organs than permanent courts? The second part of the volume consists of three substantial preparatory reports corresponding to these three themes, by Helmut Steinberger, Christian Tomuschat and Hans von Mangoldt respectively.

The material is presented over all in an English text and is organized with skill, so that the study has a coherence and utility which is often lacking in records of such proceedings. The temper of the studies and contributions is sober and there is a marked absence of glibness and panaceas. The symposium was an impressive assembly of learning and experience from many nationalities. The outcome is a significant study of international adjudication. Much ground is covered and a large quantity of information, with detailed references, is provided. Of special value are the three preparatory reports. In the first of these, concerning the International Court, Helmut Steinberger succinctly reviews the experience with particular reference to proposals for improving the working methods of the Court. The second report, by Christian Tomuschat, consists of a monograph on specialized international tribunals (aside from courts of arbitration), and is of considerable value. Lastly, the report by Hans von Mangoldt provides a very useful and up-to-date study of arbitration and conciliation.

The importance of this volume is evident. None the less the studies fail to break new ground. One view of the matter would be that there is no new ground to break and that excavation may unsettle old but serviceable foundations. However, it is possible to argue that the proper role of adjudication in international relations can be sought only with the assistance of appropriate standards and concepts of justiciability to be found in municipal legal systems. More emphasis should be placed upon the types of dispute situation. In the same general context there exists a tendency to ignore the fact that in municipal law the results of judicial activity may be lawfully revised and adjusted within

the given political system (which is not the same as ignoring the decision itself). In international affairs the decisions of tribunals normally have a relatively indelible and autonomous outcome which does not always accord with good sense. In the symposium it is only the presentation by Professor Jennings which goes into these questions.

IAN BROWNLIE

*Conflict of Laws: International and Interstate.* Selected Essays by KURT H. NADELMANN. The Hague: Martinus Nijhoff, 1972. xxiv+401 pp. (including bibliographical appendix). Gld. 59.

This work comprises a volume of fifteen essays or articles written by Kurt Nadelmann over a period of about twenty-five years. These articles have been selected by three of his colleagues at the Harvard Law School from a hundred written by Nadelmann, and they are published as a tribute to a scholar of international stature in a variety of fields. The volume also includes a short biographical introduction by David Cavers and a slightly longer assessment, by Arthur von Mehren, of the significance of Nadelmann's contribution to learning. There is also a bibliographical guide to other of Nadelmann's writings. The articles republished in this volume first appeared in a wide variety of journals, from the *American Journal of Comparative Law* to the *Modern Law Review*, from *Law and Contemporary Problems* to various *Festschriften*.

Legal scholarship owes much to those young men who fled from Nazi Germany some forty years ago and of whom Kurt Nadelmann is a fine example. Their virtues have been two-fold. They have enhanced the study of the law in the common law jurisdictions in which they made their homes, but they have not ignored the civil law background of their native country. They form a bridge between the legal systems of most of Western Europe and those of the common law world. Nadelmann is no exception and this volume of essays provides ample evidence of this. The first three parts of the book deal with aspects of the Conflict of Laws and there then follow sections on Bankruptcy, which was Nadelmann's first major field of interest, and on Comparative Law, the field wherein so many lawyers trained in Germany have been influential in England and the United States.

If one looks for a moment at the selection of articles on the Conflict of Laws, one finds two main characteristics—the historical and the comparative. The former is to be seen in the essays on Full Faith and Credit to Judgments and Public Acts, on Some Historical Notes on the Doctrinal Sources of American Conflict of Laws and on Joseph Story's contribution to American Conflict of Laws. The influence of the comparative lawyer is to be seen in the two essays on jurisdictionally improper fora. One of the most significant pieces, combining the virtues of both the legal historian and the comparative lawyer, is the well-known article on the writings and influence of Mancini—Mancini's Nationality Rule and Non-Unified Legal Systems. The sub-title of this article, Nationality versus Domicile, really epitomizes Nadelmann's contribution to the Conflict of Laws. He reveals to the common lawyer the basis of the civil lawyer's reliance upon nationality as a connecting factor, the brain child of Mancini, and most importantly the concessions to be made by such an approach to the law of the domicile in countries like the U.S.A. and the United Kingdom which comprise several law districts but have but one nationality. If Mancini could come to terms with the common law world, so then should twentieth-century lawyers. The natural progression of this 'bridging' approach is to be seen in Nadelmann's great interest in, and contribution to, the Hague Conference on Private International Law. It has been said of Nadelmann that 'without question, he is the most knowledgeable American with respect to the activities of the Hague Conference' and the proof of this is to be seen in the three essays collected together under the general heading 'Conventions on Conflicts'. The Hague Conference, and other similar bodies, have done much to reconcile the differing approaches of civil and common lawyers to problems of



the Conflict of Laws. The price of agreement may be the abandonment, at least in part, of the basic connecting factors of each system and mutual acceptance of a third. There is no better example of this than the increasing importance of 'habitual residence' as a connecting factor in the field of family law conventions and legislation at the expense of both domicile and nationality. Such conventions and agreement have only been achieved by the work of men like Kurt Nadelmann. This volume of essays is a fitting and deserved tribute.

P. M. NORTH

*The International Law of the Ocean Development: Basic Documents.* By SHIGERU ODA. Leyden: A. W. Sijthoff, 1972. xiv+519 pp. Dfl. 87.

This collection of materials is much wider than the 'Basic Documents' of the title suggests. Covering the period until early 1972, it takes in the most obvious 'sources and evidences'—the Geneva Conventions; Resolutions relating to Ocean Development adopted by both the General Assembly and the Economic and Social Council; agreements between States on the delimitation of the Continental Shelf; and also a number of proclamations, resolutions and declarations by governments and States as to their rights in off-shore areas. In addition, there are the texts of proposals and drafts presented to the U.N. Sea-Bed Committee; and, rather surprisingly, the reports and draft proposals of a variety of non-governmental conferences and of individuals on aspects of sea resources, their future use and regulation.

However valuable the book might be, it does suffer from the absence of an index. This disadvantage is accentuated by the fact that, while some sections are devoted to topics, in most cases the division of the book is by source rather than by content. The other reservation is to ask whether it would not have been far more helpful if the materials had been issued in a loose leaf binder so that fresh materials could be issued to subscribers on a quarterly, or even annual, basis.

D. W. GREIG

*Status and Extent of Adjacent Waters. A Historical Orientation.* By J. K. OUDENDIJK. Leyden: A. W. Sijthoff, 1970. 160 pp. Dfl. 24.

The title of this interesting work is more ambitious than the scope of the subject-matter, which is really a study of the views of Grotius and his immediate successors on the theoretical basis of sovereignty of the seas. There is little that is relevant to 'status' of adjacent waters, whether, for example, they are royal waste of the English Crown, upon which there was much in the way of literature and case law in the seventeenth century. While the work is a valuable contribution to the history of maritime jurisdiction, therefore, it is not complete on the theory and practice of the seventeenth century, and only introductory to the eighteenth century. Even in the matter of theory it does not penetrate very deeply into the philosophy of the matter which led to a shift of emphasis about Selden's time from a theological to a secular justification of maritime claims. Also, it is lacking in historical insight in some respects. For example, the question of sovereignty gained by fleets rather than by fortresses is not related to the naval stalemate reached in the Anglo-Dutch Wars, which demonstrated that no exercise of sea power was more than ephemeral; and little is added to the researches of Walker in this *Year Book* for 1945 or of Kent in the *American Journal of International Law* for 1954 on the problem whether the cannon-shot was linked to the actual location of batteries, and, if so, at what period it was broadened into a notional basis of the territorial sea. The diplomatic archives, on the whole, still remain to be researched, and the chapter on State practice in this book is based on a survey of treaties and some literature rather than on documents.

Also the literature covered, which appears to be comprehensive, is not completely so. For example, there is no mention of Kestner, Vitriarius, Willenberg, Heineccius,



Moser, Surland, Emerigon, Neyron, Günther, or of Gundling's reference to three-miles fifty years before Galiani. Admittedly these are all lesser lights but some of them do illuminate the darkness that shrouds doctrine between Pufendorf and Vattel, and is generally only penetrated by Wolff. This is a key period in the evolution of diplomacy respecting the law of the sea, and more remains to be done in the way of original research to show how the practice of States and doctrine respecting territorial acquisition were related. The War of the Austrian Succession is probably a turning-point, and the debate in the House of Lords on the law of the sea on the eve of the outbreak of the War of Jenkins' Ear in 1739 seems to be highly significant, although it is not mentioned by the author of this book.

Finally, there is no extended discussion of the philosophy underlying the notion of innocent passage, without which evaluation of the doctrine respecting coastal waters in the eighteenth century is incomplete.

Apart from these restrictions on its scope, this book is a most interesting and valuable contribution to an important historical, philosophical and legal question. It is now the most complete review of Grotius' doctrine on the law of the sea. It must be confessed that the closer one examines Grotius' texts the more elusive they become. His distinction between *imperium* and *dominium* for example, upon which Texas argued that its property in the seabed was unimpaired by the vesting of sovereignty over the territorial sea in the United States, is open to many interpretations. This reviewer has expressed the opinion that Grotius did not intend it as justifying jurisdiction over foreign ships outside national waters (this *Year Book*, 1971, p. 311). The distinction is just touched upon in the work under review (p. 27).

The academic significance of this type of study cannot be underestimated. The contemporary law of the sea is encumbered with notions derived from the history of the subject which are often misunderstood or misapplied because the practitioner in the field lives in a vacuum in time with little sense of the derivation of the concepts available to him. Students and diplomats alike are often fascinated by the new dimensions revealed in the history of the topic when it is expounded to them. Few historians or international lawyers today are technically equipped to undertake the task of revelation, if only because of the difficulties presented by the dog-Latin of the seventeenth century. Generally speaking the topic has fallen between two stools, the lawyers feeling themselves incompetent in the historical field and the historians extending their general disinterest in diplomatic history into a disinclination to study this rather narrow aspect of it, the law of the sea. Yet, as Kent has revealed in his article, and now in his *War and Trade in Northern Seas* (Cambridge University Press, 1973), control of coastal waters was as important in the history of commerce as it is today in the matter of natural resources, and should thus attract the interest of the economic historian to an extent greater than is the case. For these reasons the subject owes a debt to Dr. Oudendijk whose skills in this literary field have been so profitably employed.

D. P. O'CONNELL

*Die Vereinten Nationen: Ihre politischen Organe in Sicherheitsfragen.* By WERNER PFEIFENBERGER. Salzburger Universitätsschriften: Schriften zu Recht und Politik, Vol. 11. Salzburg and Munich: Anton Pustet, 1971. 662 pp. No price stated.

Though Professor Pfeifenberger has some doubts whether, from its very beginning, the United Nations could have lived up to the expectations of the post-1945 era (p. 15), he none the less embarked on a long and detailed study of the Organization's practice relating to international security. He shows how in this field the powers of the political organs of the United Nations developed, and he also analyses the attitudes of Member States.

The book covers the first twenty-five years of the Organization which are subdivided into a number of periods. The first extends to the adoption of the Uniting for Peace Resolution (1950). Then the chronological pattern is dropped and the reader's attention is drawn to the influence which that Resolution has had on the handling of security problems. Thereafter we learn about 'other security questions' (pp. 259-370), and the chronological thread is again discernible, including the last part of the book which is devoted to the developments after the Congo crisis. Within each part and period the writer distinguishes between issues in which the permanent Members of the Security Council were directly involved and other conflicts or situations. This distinction brings into focus the collapse of the original United Nations concept of international security. Instead of sitting in judgment upon other States endangering that security and instead of conciliating their own differences and reforming their own policies, for a long time the Great Powers accused each other before the Organization of violations of the Charter (pp. 117-19).

One answer to the dilemma presented by the conflict between the Charter and political reality was more reliance on the General Assembly. The writer points to the search for solutions *extra chartam*. But with the passing of time it became clear that practically none of the Members, whether a Great Power or not, has adopted a consistent interpretation of the Charter in security matters. Not infrequently some Members have changed their position from case to case.

The analysis of the use of the veto is instructive (pp. 160-5, 357-60, 552-4, 591-2). While the writer points to some beneficial effects of the veto as a contingency, namely in reaching consensus among the Great Powers, he is rather sceptical about the Uniting for Peace Resolution ('an attempt and a failure to meet political conflicts with juridical stratagems', p. 177). He is right in emphasizing that there was little novelty in the Resolution in so far as recommendations on non-military measures were known in the earlier practice of the Assembly (p. 239). On the other hand, he seems to underestimate the initial role which the Resolution played in originating peace-keeping operations. During the Congo crisis the Assembly proved of help in supporting the Secretary-General when he found himself in conflict, sometimes openly, now and then in a disguised form, with one or another of the Great Powers.

The diminishing importance of the Assembly after 1960 resulted, according to the writer, from what he describes as the 'irresponsible conduct' of the African and Asian States (p. 444). Consequently his language is rather critical when he refers to the resolutions which the Third World forces upon the Assembly (pp. 550, 551 and 553). While the fifties were a decade of the Secretary-General (p. 361), in the sixties the Uniting for Peace Resolution was practically forgotten and there came about a slow revival of the role of the Security Council, a trend which continues. This revival manifests itself in a more frequent use of Article 39 of the Charter and in the recommending or even the ordering of sanctions (pp. 554-8). Nevertheless one should not exaggerate the chances for more important military actions under Chapter VII of the Charter. The world remains divided into zones of influence and it lacks a minimum of common values, a phenomenon which paralyses the full application of that Chapter (p. 599).

It is surprising that the writer has included the International Court of Justice among the organs of the United Nations which are 'directly' charged with the maintenance or restoration of 'world peace' (p. 15). The idea seems very dubious, and the reviewer submits that this is so irrespective of the fact that the Members, with a very few exceptions, have refused to submit their more important disputes to the Court. In matters of peace and security an international court of law has little to say and little to contribute. In the United Nations there has been a marked reluctance to seek the advice of the International Court, while it has proved erroneous and ineffective to use the instrumentality of advisory opinions to impose an interpretation or to bring about the change of an attitude. The whole concept of the Court as one of the principal organs of the United Nations is far from clear; should the Court become subjected to the politics of the



Organization and its changing majorities? In the reviewer's opinion judicial settlement would fare better had the Court been completely divorced from the United Nations. It would then assume the more limited but more honest role of the organ of that group of States which accept its compulsory jurisdiction in one or another category of disputes.

The writer concludes that the mission of the United Nations is 'to mediate among the multifarious contradictions of an ideological and political nature, to maintain the dialogue with all the parts of the world, to reconcile the existing conflicts and to neutralize the political discrepancies' (p. 598). One agrees that these are tasks large enough to exclude any expansion. The writer adds that the present generation should not have the vision of creating a World State.

The value of the book lies both in the meticulous digesting and analysis of the various conflicts and in the generalizing conclusions, though one does not necessarily share all the latter. The writer has examined a mass of documentary evidence and his book is useful to any reader who, knowing German, wishes to gain knowledge or to refresh his memory of how the United Nations handled specific questions relating to security in the period between 1946 and 1970. The book is a voluminous work of reference, and it is astonishing that it does not contain an index.

K. SKUBISZEWSKI

*The World Court: What it is and how it works.* By SHABTAI ROSENNE. Third edition. Leyden: A. W. Sijthoff; Dobbs Ferry, New York: Oceana Publications, 1973. 252 pp. Dfl. 50.

This book is not intended for the specialist in international law. It is directed principally at the man of affairs, the diplomat, the politician, all those interested in international affairs. But the work is so authoritative and so lucid that the international lawyer, whether he be an expert on the Court, or not particularly knowledgeable about the Court, or a student, will thoroughly enjoy reading it. The big Rosenne is there for those who want to pursue matters in more detail.

This book contains history, the origins, the judges, jurisdiction, procedure, beautiful little vignettes of all the Court cases, and a final evaluation.

The Court has not become a dominant instrument of international law and international affairs, based on universal compulsory jurisdiction and effective enforcement. The real international disputes have not come up for judicial decision. There is no compulsory jurisdiction. The device of the advisory opinion has failed to circumvent lack of agreement to submit to jurisdiction. Decisions have remained unfulfilled. But despite all this the achievement has been considerable, bearing in mind the continuing and severe international tension of the post-war years. Politically charged issues have been deflected into peaceful channels. Nations have felt themselves subjected to pressure. The Court has shown considerable creativity and dynamism, and sympathy towards the new nations, and has made international law much more international and much less European in character. If two States both have a genuine willingness to resolve a dispute the Court has been particularly helpful in bringing a successful conclusion to pass.

Recent events show both the creative capacities of the Court and its continuing limitations, giving rise to a realistic cautious optimism. States have accepted jurisdiction for the first time, or extended jurisdiction (Costa Rica, El Salvador, India and Australia). Novel ideas about preferential rights emerged in the Icelandic fisheries case. France abandoned atmospheric nuclear tests in favour of underground ones and the case brought by Australia and New Zealand proceeded no further: though it is a pity that France has subsequently withdrawn her acceptance of jurisdiction. The status of the Western Sahara has been the subject of a request for an advisory opinion.

Rosenne sums it up (p. 167): 'In the light of the general international situation, the wonder perhaps is not so much what the Court has been able to do, as that in fact States



continue to show willingness to refer a number of major disputes to its decision, and great interest in all that pertains to the Court. This is the encouraging feature of the experience of the International Court, for it shows that even if its jurisdiction is not compulsory, its permanency as an international organ enables it to play its own constructive role in the pacific settlement of international disputes despite the constantly disintegrating international situation.'

International lawyers must promote interest, knowledge and informed opinion. This book is one of the best short contributions to help them in their task.

ALEC SAMUELS

*Documents on the International Court of Justice.* Compiled and edited by SHABTAI ROSENNE. Leyden: A. W. Sijthoff; Dobbs Ferry, New York: Oceana Publications, Inc., 1974. xi+391 pp. Dfl. 78.

This most helpful book presents the materials as they stood at the end of 1973. In substance it is documentary but certain sections are presented in narrative form. The narrative sections include accounts of elections to the Court and voting in the Court. The value of the collection is obvious and the work is entirely self-sufficient: at the same time it completes and brings up to date the appendices to Dr. Rosenne's study, *The Law and Practice of the International Court* (1965). There is a modicum of pertinent but unobtrusive editorial matter consisting of some bibliographical references and indications that a given document has been invoked in the Court.

IAN BROWNLIE

*Digest of United States Practice in International Law 1973.* By ARTHUR W. ROVINE. Washington: U.S. Government Printing Office, 1974 (Department of State Publication 8756). xxi+618 pp. (including index). \$7.50.

This volume was released in July 1974 and is the first fruit of a decision by the Department of State to publish an annual volume of current United States practice in international law. The decision is recorded and explained in a short introduction by Carlyle E. Maw. In his words it 'marks a new approach' and moves away from the tradition of issuing comprehensive multi-volume surveys covering a wide range of legal materials, though with emphasis upon United States practice.

Arthur W. Rovine, of the Department of State, is the author of the first substantial volume. In his preface he states that the notion of 'practice' has been treated as liberally as possible, and thus material is drawn from many sources, including Federal Court decisions, statements to press conferences and internal memoranda. The volume is conveniently organized, attractively produced and well indexed. The work involved must have been very considerable and Mr. Rovine was the recipient of the 1975 Annual Award of the American Society of International Law. The new policy of the Department of State is to be welcomed, even if not everyone will be persuaded that there is no longer any role for the periodical multi-volume collection.

IAN BROWNLIE

*Le Domicile international.* By BERNARD SCHNEIDER. Neuchâtel: Éditions Ides et Calandes, 1973. 242 pp. Fr. 42.

This is an interesting little book which sets out to examine the part played by domicile as a connecting factor in the conflict of laws in a variety of differing jurisdictions. It is a comparative work in several ways. The main comparisons drawn are between the concept of 'international domicile' as understood in France, Germany and Switzerland. However,

other comparisons are made on a different plane. Inevitably, when examining civil law systems, the author finds himself comparing the function of domicile as a connecting factor with that of nationality and, indeed, this is the starting-point of the work. More recent international developments have led to greater reliance on habitual residence as a connecting factor and so comparisons are also drawn between habitual residence and domicile as connecting factors.

The second part of the book examines the rules, rather than the role, of domicile, i.e. the rules for determining whether a person has acquired or lost a domicile. Here is to be found consideration of such familiar problems as the common domicile of spouses and the determination of the domicile of special classes of persons: students, prisoners and the sick being selected for special treatment.

The interest of this book for the conflicts lawyer trained in the common law world is indirect, but quite substantial. Many common lawyers tend to believe that domicile is the predominant common law connecting factor, nationality is the equivalent for the civil law and the two can only meet by compromise in habitual residence. What is revealed here is how substantial a role is played by domicile in three major civil law systems. Having said that, one must realize that domicile does not have an identical meaning and content for both the civil and common lawyer. Nevertheless, one can identify the differences and a section of the work is devoted to such a comparison. It would have been particularly helpful to the common lawyer if that section had been more substantial, though in the second part of the book comparisons as to detailed rules are drawn, from time to time, between the two.

Apart from the minor point that the pagination in the table of contents is consistently inaccurate by two pages, this is a book to be recommended to the conflicts lawyer who seeks a better understanding of the connecting factors relied upon in the civil law.

P. M. NORTH

*Jurisdiction over crimes on board aircraft.* By SAMI SHUBBER. The Hague: Martinus Nijhoff, 1973. xxii+369 pp. (including index). Gld. 55.

This is the definitive study on the Tokyo Convention on offences and certain other acts committed on board aircraft 1963, operative in 1969. (For the Tokyo Convention Act 1967 (U.K.) see this *Year Book*, 42 (1967), p. 271.)

The work starts with the history of the problem and then leads into a penetrating technical study of the Convention, considering the relevant general principles of international law such as jurisdiction, sovereignty and nationality, exposing the pre-1963 legal defects, i.e. lack of, and conflicts in, jurisdiction. The 1963 jurisdictional solution is essentially that of registration and the 'flown-over' State where this is affected.

Flight involves many inherent risks: temptation to carry drugs; excess alcohol consumption, leading to fighting and disorder; and, unhappily, politics. Apart from politics, things have worked reasonably well, and the Convention has proved a most useful and creditable achievement. None the less Dr. Shubber rightly draws attention to the weaknesses. The United Nations and other international organizations are not covered. The use of the flag of convenience is not desirable, and there is no genuine link principle. There are considerable practical difficulties in enforcing the law where a charterer or lessee operates largely outside the territorial jurisdiction of the State of registration, and the commander may find himself in an awkward situation. The rights of the crew are too limited (p. 262). The authority of the commander over a diplomat is not clear (p. 212). The line between liability and immunity from liability is not absolutely clear. The mere application of the ordinary criminal law to an aircraft, extra-territorially, may prove to be inadequate and unsuitable in the absence of special provision.

The question: Is hijacking piracy? has previously been argued by Dr. Shubber in this *Year Book*, 43 (1968-9), p. 193. The fearful problem of hijacking was found to be

inadequately provided for by the Tokyo Convention, principally because of lack of extradition powers, so this problem had to be dealt with by the Hague Convention on the suppression of the unlawful seizure of aircraft 1970, conferring jurisdiction upon the State of registration, the landing State, the State where the headquarters of the charterer or lessee is situated, and the State where the hijacker is found. Dr. Shubber naturally discusses the 1970 Convention, though it is perhaps a pity for the sake of completeness that he did not treat the 1970 Convention as a sister Convention to be treated in the same way as the 1963 Convention. The 1970 Montreal Convention for the suppression of unlawful acts against the safety of civil aviation could have been similarly treated. These two conventions have been given effect in English law by the Hijacking Act 1971 and the Protection of Aircraft Act 1973.

As may be expected from this respected scholar, the text is detailed, accurate, well documented, perceptive, and extremely readable. The influence of British lawyers on the solution of the problem of jurisdiction over aircraft is evidenced by the bibliography. Dr. Shubber has assimilated the transmitted learning and brought his own scholarship and thought and contribution to bear to produce the definitive study.

ALEC SAMUELS

*The Public International Law of Money.* By M. R. SHUSTER. Oxford: Clarendon Press, 1973. ix+356 pp. £6.

The present work is divided into three parts headed, respectively, pre-Fund period, post-Fund period: global monetary arrangements, and post-Fund period: regional and bilateral monetary arrangements. The emphasis is placed upon the conventional structure created by the members of the International Monetary Fund and some other, partly informal arrangements. On the whole these parts of the book are clearly written, informative and illuminating. The author has avoided the danger of confining himself (as others have done) to a purely descriptive presentation. He aims at analysis, diagnoses problems and suggests solutions. In particular, the strictly legal implications of the provisions applicable to the International Monetary Fund are helpfully discussed. Much care has been devoted to Special Drawing Rights. Dr. Shuster has the courage to ask (p. 200): 'What are Special Drawing Rights?' He does not think that the question whether they are money or credit can be answered except 'in the light of State practice' (p. 201). He considers it possible that Special Drawing Rights are 'an international form of legal tender' (p. 202), and concludes (p. 204) that

definitive pronouncements on whether Special Drawing Rights are a supranational currency, or international legal tender, or international fiat money cannot be made. Certainly, when compared with the legal nature of money in its municipal context, they appear to possess many similar attributes. However, such analogies are not in themselves conclusive. Much will depend on subsequent State practice. Indeed, all that can be stated with certainty at this point is that Special Drawing Rights are *sui generis* in the law.

These formulations may be tentative and provisional and some observers may think that more specific suggestions would be possible, but they are a step in the direction of analysis. Whether it is a correct analysis is another matter. The present writer confesses that he is taken aback by the suggestion that in the legal sense Special Drawing Rights could be money rather than credit.

Some oddities of the book cannot be ignored. In the first place we are not told anything about the author, his professional status or his connection with the subject. Is it fair to hazard the guess that the book is derived from a thesis on the strength of which the author obtained the degree of Doctor of Philosophy of the University of Oxford? Secondly, we are not told anything about the point in time from which Dr. Shuster writes. The latest date mentioned in the text seems to be June 1972 (p. 237), when for all



practical purposes the sterling area became so small as to disappear. On the other hand *The Legal Aspect of Money* is used in its second edition, and the third edition which appeared in October 1971 is disregarded. So is that great work, *The International Monetary Fund 1945-1965*, which appeared in 1969 and was reviewed in this *Year Book*, 1970, p. 256. And the number of the Fund members is stated as at November 1969 (p. 112). An author who writes on a continuously changing subject would assist his readers if he intimated the 'closing date', particularly in view of the fact that at the latest since August 1971 the role, influence and power of the Fund have proved largely ineffective—in the monetary sphere, both national and international, the state of turmoil continues to be unabated. Thirdly and most remarkably, the learned author, as mentioned above, distinguishes between 'pre-Fund' and 'post-Fund' problems. Readers are unlikely to cavil at the latter term, although the Fund is by no means dead. What is much more important is the fact that the customary public international law of money is dealt with in Part I. Yet it cannot possibly be suggested that that branch of the law has been superseded by the Fund, nor does Dr. Shuster attempt to do so. He justifies his arrangement by stating that the prerogatives of the State have been so severely curtailed by treaties that there may be a case for 'evolving new rules of international monetary law from rules of international conventional law' (p. 46). Even before August 1971 such a thesis could hardly be maintained. To take a single example, the law of the Fund or any other treaty left untouched that part of customary international law which involves the administration of exchange control, at any rate as regards capital transactions, but also as regards certain aspects of current transactions.

Notwithstanding these criticisms it should be made clear that this is a most welcome addition to the literature on monetary law. It is to be hoped that Dr. Shuster will continue to devote attention to it.

F. A. MANN

*The North Sea. Challenge and Opportunity.* Edited by M. M. SIBTHORP. London: published for the David Davies Memorial Institute of International Studies by Europa Publications, 1975. xiii+324 pp. (including index and appendices). £6.95.

Early in 1972 the David Davies Memorial Institute decided to form a study group to examine the present and future uses of the North Sea, together with the problems posed by such uses and their possible solutions. The decision was a timely one, as first the oil crisis, then successive sessions of the United Nations Conference on the Law of the Sea focused attention on the legal and political problems of ocean management and underlined the need for rational utilization of Western Europe's most important sea.

The present volume sets out the investigations and recommendations of the Group. The first three chapters examine the ways in which the North Sea and its coast are used and the many situations in which these uses are in competition. A mass of information is intelligibly presented in numerous tables and diagrams. The scientific expertise of the Group has clearly been employed to good effect and the attempt to relate competing uses to each other is a useful contribution to the environmental debate. Two minor criticisms of these chapters may be made. First, it is difficult for the reader to assess some of the data. Statements such as 'Existing nuclear power stations on the coast of the North Sea are reported to have a good safety record' (p. 34) are of little value without some reference to whose opinion is being reported. Secondly, though the attempt to make the various complex scientific issues intelligible to the non-specialist is in general successful, occasionally it is not. For example, the discussion of the Biological Oxygen Demand of waste matter would be more meaningful if some indication had been given of the capacity of sea water to meet such demands.

In the longest chapter of the book Dr. Mendelson studies the position of the North Sea in international law. Though his treatment is comprehensive, as might be expected rather more attention is devoted to controversial topics, such as fishing or jurisdiction, than to relatively settled issues such as continental shelf delimitation. The author is to be commended on a lucid exposition which includes a particularly useful account of the Common Fisheries Policy of the E.E.C. Inevitably, Dr. Mendelson's discussion has sometimes been overtaken by events. No doubt when setting the legal problems of the North Sea in their international context he would today be inclined to discuss the content and implications of Icelandic claims more fully and to examine the whole concept of the patrimonial sea and its likely impact on resource management and pollution control. The brief account of the *North Sea Continental Shelf* cases might mislead the unwary into believing that the Court accepted the German argument and, on a more general note, more might have been said about the practical effectiveness, as opposed to the formal requirements of the law, especially in respect of pollution and conservation.

In the penultimate chapter Dr. Mendelson and Elizabeth Wilmshurst join forces to provide an excellent account of the status of the North Sea in the law of England and Scotland. Not surprisingly, the original intention to provide a review of the municipal laws of all the North Sea States had to be abandoned. What emerged instead is, however, of considerable value, collating for the first time a mass of legislation and case law, much of it obscure, and discussing the legal implications of such possible future developments as large-scale fish farming.

In the final chapter the Group sets out its conclusions and recommendations. Pointing out that urgently needed measures are often inhibited by lack of information, they propose the creation of a Standing Conference of North Sea States to further research and co-operation. Improved machinery for monitoring and policing North Sea treaty law is also recommended, together with legislation in each North Sea State requiring scrutiny of all North Sea projects for environmental impact.

In the United Kingdom specifically, permanent bodies to integrate the consideration of North Sea issues are proposed, together with more resources for bodies, such as the Navy, at present charged with responsibility for particular aspects of North Sea activity. Integration of research and decision making may be said to be the keynote of the Group's recommendations. They are surely right. Though on occasion the Group appears to believe that centralization always promotes efficiency and to overlook the fact that in free societies environmental protection must at some point yield to personal liberty, their general case is indisputable. Of course we need an integrated approach to the North Sea, along with environmental decision-making that is both conscious and well informed. It is to be hoped that this book will be read by those on whose decisions the future of the North Sea depends.

The four lengthy appendices contain a list of treaties and conventions concerning the North Sea, a map showing fishing zones, an account of petroleum and natural gas resources in the North Sea, taken from *Keesing's Contemporary Archives* and illustrated with a map, and extensive extracts from Belgian, Danish, Dutch and Norwegian legislation dealing with the exploitation of the North Sea. The treaty list would have been improved by the inclusion of the *United Nations Treaty Series* references (though these can be found in footnotes in the text). The maps are useful and the translations of foreign legislation are exactly what will be needed if the integrated approach recommended by the Group is ever to be achieved.

There is an excellent index which perhaps could have been usefully supplemented by a separate list of acronyms and abbreviations.

The present volume is the first in a projected series examining all the waters round the United Kingdom. It is a good start to what promises to be an enterprise of major importance.

J. G. MERRILLS



*South West Africa and the United Nations: An International Mandate in Dispute.* By SOLOMON SLONIM. Baltimore & London: Johns Hopkins University Press, 1973. xix+409 pp. \$13.50.

For many, the activities of the United Nations and the World Court with regard to the former Class C Mandate of South West Africa, and especially recent resolutions asserting an ineffective and unenforceable transfer of the right to administer the territory from South Africa to the United Nations itself, constitute nothing but an exercise in futility. However, an account of the history of the drawn-out debates in the United Nations, as well as the careful legal analysis of various aspects of the mandates system, trusteeship, succession, human rights and the like which is to be found in the *jurisprudence* of the Court in its various opinions and judgments on this issue, is of major value.

Dr. Slonim opens his study with an account of the historical background to the mandates system, and states that 'by early 1918, . . . the allied leaders were basically committed in their peace program to the right of self-determination of peoples' (p. 13). While it is true that some of the speeches might have created this impression, a more careful reading of the statements made and of the situation would show that this would only be true of peoples under enemy rule and did not apply to the colonial territories of the Allied and Associated Powers, and his later account shows how there was a retreat even from that stand in so far as enemy colonies were concerned. What follows is largely an account of the historical development of South West Africa from the granting of the Mandate until the visit of the Secretary-General of the United Nations to the territory. In view of the significance for British policy towards Southern Rhodesia of the findings of the Pearce Commission, it may be as well to mention that in 1946 there was a 'referendum' in South West Africa which showed—or purported to show—that 288,850 out of 299,160 non-Europeans were in favour of becoming part of South Africa (p. 78).

It has become popular since the 1962 decision of the Court to assume that only Judges Spender and Fitzmaurice were opposed to giving juridical recognition to Ethiopia and Liberia. It is valuable, therefore, to have Dr. Slonim's reminder of the careful dissent by Judge Winiarski (pp. 204–6), which emphasizes that it may be exceedingly dangerous to attempt to forecast a judge's view by reference to his nationality or the political ideology of his State. He also reminds us of the importance of bearing in mind the closeness of the 1962 vote and the changes in the personnel of the Court by the time of the 1966 judgment, while weighing against this 'fluke, . . . accident, . . . anomaly' (pp. 280–2) 'the strengths and weaknesses of the legal—as against the political or emotional—criticisms leveled against the Court' (p. 282), for a decision which, despite the Court's disclaimer, 'in fact, if not in technical form, represents a reversal of the 1962 judgment' (p. 284).

Many of the critics of the judgment are motivated by their dislike of *apartheid* and leave the impression that the minority view was that this was to be the standard for measuring international conduct. The author's examination of the details of the dissenting judgments leads him to conclude that 'barely one judge [—Tanaka—] out of fourteen endorsed Applicants' norm thesis, even in part, and each of the dissenting judges who ventured to address himself to the merits found it proper and, in fact, essential, to take account of and evaluate the factual situation—something which the Applicants had expressly excluded' (p. 302). In this connection, Dr. Slonim comments that the Applicants perhaps did not push their evidence as to the nature of *apartheid* sufficiently, spending too much time on 'novel theories regarding the law-creating powers of international organizations', for 'evidence of the total unreasonableness of apartheid might well have convinced [the judges] of its utter incompatibility with the legal obligations assumed under the mandate' (pp. 305–6). He reiterates the view of Professor Johnson that having over-estimated their chances of success it is unreasonable of the Applicants to vent their discontent solely at the tribunal without examining their own failings (p. 309).



Propagandists for the United Nations have made much of its contribution to decolonization, but in Dr. Slonim's view its role has in reality been minor, with 'independence . . . an end-product of a panoply of diverse internal and external forces and pressures which the Organization [in the words of Alf Ross] "neither created nor conjured up" ' (p. 361). He reminds us that the contribution of the Court to the settlement of a dispute of this character depends on bilateral agreement to abide by the decision and some means whereby the losing party can be compelled to accept the ruling (p. 359). Far from contributing to settlement of the issue, he suggests that the Court may well have served only 'to bar any compromise settlement' (ibid.), and he considers that the only way out of the dilemma is not by way of fruitless resolutions but the seeking of a viable *modus vivendi*.

Slonim's study of *South West Africa and the United Nations* is not only a useful contribution to the understanding and analysis of this complex problem, it also serves as a valuable guide to methodological research.

L. C. GREEN

*International Protection of Human Rights*. Edited by LOUIS B. SOHN and THOMAS BUERGENTHAL. Indianapolis: The Bobbs-Merrill Co., Inc., 1973. xlv+1402 pp. (including index). \$19.50.

*Basic Documents on International Protection of Human Rights*. Edited by LOUIS B. SOHN and THOMAS BUERGENTHAL. Indianapolis: The Bobbs-Merrill Co., Inc., 1973. vi+244 pp. \$4.25.

Contrary to the impression that may be given by a comparison of the two titles, the main volume—*International Protection of Human Rights*—is also a collection of primary materials: cases, diplomatic correspondence, resolutions of international organizations, etc., complemented by numerous excellent bibliographies.

The first Chapter deals with the position of the individual in international law, the second with the protection of aliens, and the third with humanitarian intervention. Chapter IV is devoted to the international protection of minority rights, and Chapter V to the mandates system, with special reference to South West Africa. Chapter VI deals with other aspects of the protection of human rights by the United Nations, Chapter VII with the European Convention on Human Rights, and the final Chapter with the inter-American arrangements.

The reader gets a lot for his money in this enormous volume, and even specialists will be grateful for the inclusion of a great deal of recondite and fascinating material. The fragmentary nature of so many volumes of cases and materials is happily absent here. If anything, some extracts are perhaps too long: not because they lack interest, but because treating the reader to, for instance, 36 pages on the intervention on behalf of the Christian population of Mt. Lebanon in 1860-1 inevitably results in the excision of something else. Similarly, without wishing to seem ungrateful for the feast provided, and bearing in mind that tastes and paedagogic needs may differ, this reviewer nevertheless feels obliged to express his reservations as to the balance and over-all coverage of the volume. Viewed in isolation, it may be very desirable to have 70 pages on humanitarian intervention, or 117 pages on procedures for dealing with communications from individuals in the United Nations Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities; but the reader may view things in a different light when he realizes that there is virtually nothing on such matters as the work of the International Labour Organization, on human rights in armed conflict, and, most surprising of all, on the United Nations Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. However, the fact that the appetite is still not satisfied after nearly 1400 pages is perhaps a measure of the editors' success, and they are to be congratulated on producing a most useful tool for teaching and research.

The companion *Basic Documents* volume contains most of the major treaties as well as some other documents of importance; its coverage is, however, less extensive than Brownlie's *Basic Documents on Human Rights*.

MAURICE MENDELSON

*L'Allocation d'intérêts dans la jurisprudence internationale.* By JEAN-LUC SUBILIA. Lausanne: Imprimerie Vaudoise, 1972. 174 pp. (including bibliography and index). No price stated.

This is an example of the *petit point* of international law, but none the worse for that. M. Subilia's subject is the award of interest, and he has made a meticulous examination of international awards and decisions from those of the Jay Treaty Commissioners to those of the United States Foreign Claims Settlement Commission and the Arbitral Tribunal on Property, Rights and Interests in Germany in our own day. He sought to answer the basic questions that arise: if the *compromis* is silent, is an international tribunal competent *ex officio* to award interest on the capital sum which it assesses as reparation for an international wrong? If it can award interest, are there any rules of international law specifying the *dies a quo* and *ad quem*, and the rate of interest? What is the position concerning 'interest as damages' as distinct from interest on awards?

The jurisprudence supplies a clear affirmative answer to the first question (p. 107). The two contrary decisions stand out as isolated exceptions. Indeed, whatever the terms of the *compromis*, examples of refusal to award interest as part of the reparation are few. This is as true for tribunals applying equity, or justice and equity and the like as for those applying international law. M. Subilia is scrupulous to observe this distinction in his presentation of the case-law. He cites only one case of refusal in principle, the *Montijo* case, a claim by the U.S.A. against Colombia arising out of seizure of the merchant ship *Montijo* by insurgents and its subsequent transfer to the successful government who used it for some time before returning it to the American owners. The other instances of refusal (pp. 64-9) were said by the tribunals to be due to particular circumstances. Some of the language used in the *Lighthouses* award of 1956 between France and Greece seems to have elevated this relativity into the norm, saying that there are no rules which prescribe or forbid the award of interest and 'the solution depends largely on the character of each individual case'. In fact, the arbitrators' award of interest only from the date fixed for execution of the award and their refusal of interest as damages is attributable to the special method devised for calculating the damages. This aimed to avoid distortions due to devaluation of the various currencies in which the lighthouse company would have been paid its dues between 1909 and 1928. M. Subilia quotes the complete passage (pp. 67-8) to make this clear. Where tribunals give global sums in reparation, which has happened frequently, it is usually impossible to say whether they have given any consideration to the award of interest.

The question of interest was discussed at length by the parties in the *Chorzów Factory* case. In the passage so often quoted from its judgment, the Court declared that interest is due as part of the reparation for an illegal act, whether the reparation is in the form of restitution or of monetary compensation in lieu of restitution. The International Court has not pronounced on the question. In the *Corfu Channel* case it felt bound by the *nec ultra petita* principle, so that the United Kingdom was not given interest, but was awarded the full sum in damages which she claimed. When relations between the United Kingdom and Albania come into existence once more, it will be interesting to see whether Albania offers any sum by way of moratory interest, or whether the United Kingdom will settle for the sum awarded (or some approximation thereto) but paid in sterling at its contemporary value, which sadly bears little relation to its value in 1946.

The author rigorously excludes the doctrine on the subject, and his own views, from the chapters devoted to case analysis. Three concluding chapters survey the doctrine and give us the author's conclusions on moratory interest and interest as damages. He



submits that the jurisprudence yields only two propositions that are evidence of accepted rules: the implied power of a tribunal to give interest where the *compromis* is silent, and the presumption of loss caused by depriving a creditor of a sum due for a certain period of time. This head of damage should be covered in the total reparation awarded, unless the *compromis* expressly forbids this. The modalities of the award of interest—the *dies a quo* and *ad quem* and the rate—are matters on which tribunals have a wide discretion, if the *compromis* does not lay down rules. M. Subilia argues persuasively that the principle of full reparation is capable of supplying adequate criteria for these questions, in most situations. Interest is due from the *dies aestimandi*, the date chosen by the judge as the appropriate moment at which to assess the damages (in practice, either the date of the wrongful act or the date of decision), to the date when the damages are paid. The rate cannot be set uniformly if the principle of complete reparation is followed, but must be chosen to meet the circumstances of the case.

This is a careful and well-presented monograph on a limited subject, but one of great practical importance. M. Subilia's book should find a place on the shelf of any lawyer who has to present cases to a claims commission or similar body and, clearly, also on the shelves of members of such tribunals.

GILLIAN WHITE

*Die europäische Menschenrechtskonvention, ihr Schutz der persönlichen Freiheit und die schweizerischen Strafprozessrechte.* By STEFAN TRECHSEL. *Jura Homini ac Civis*, vol. V. Berne: Verlag Stämpfli & Cie. A.G., 1974. 392 pp. (including bibliography and annexes). Swiss Francs 69.

The work for this book was completed before the accession of Switzerland to the European Human Rights Convention. Far from being overtaken by the accession, this study has actually gained in importance and significance by that event.

The book is divided into three parts of roughly equal dimension. The first offers a general survey of the history, aims and functioning of the Convention as a whole. This part is not only a very useful introduction to the law of the Convention but also offers some stimulating thoughts on a number of procedural questions. The second part consists of a study in depth of the problems surrounding one of the Convention's most important and most frequently invoked guarantees: the right of liberty of the person as laid down in Article 5. This systematic investigation, which relies heavily on the practice of the organs created by the Convention, offers a thorough analysis of the various legal aspects of Article 5 supported by a wealth of material. In the third and final part of his book the author examines the conformity of Swiss criminal procedure with the requirements of Article 5 of the Convention. This task is particularly intricate in view of the different legal provisions in the various cantons. The examination of the compatibility of the domestic provisions with the Convention is undertaken in a critical fashion untainted by the national complacency which sometimes blurs the judgment of lawyers writing about their own domestic law.

The conclusion reached by the author is that there is a number of provisions in federal and cantonal law which carry the danger of a violation of Article 5. Nevertheless he does not favour any extensive reservations to that Article, a recommendation which was in fact largely followed by the government. Instead he expresses the hope that any existing discrepancies would be removed either automatically upon the entry into force of the Convention in Switzerland, by an adjustment of court practice to the Convention standards or, in some cases, by appropriate amending legislation.

This book must be an extremely valuable help to Swiss lawyers and decision-makers who are now in the process of getting acquainted with the manifold practical problems posed by the Convention. Its clarity and thoroughness will also make it an important work of reference for anybody interested in the Convention and in particular Article 5.

CHRISTOPH H. SCHREUER



*Theory of International Law.* By G. I. TUNKIN (translated from the Russian, with an introduction, by William E. Butler). London: George Allen & Unwin, 1974. xxvi+497 pp. £8.

Professor Tunkin needs no introduction to Western readers. His *Voprosy teorii mezhdunarodnogo prava* (1962), a French translation of which was reviewed in this *Year Book*, 40 (1964), pp. 420-2, rapidly established itself as the leading statement of Soviet views concerning theoretical problems of international law. The present work is an updated, revised and much expanded version of his 1962 book.

As regards style, Professor Tunkin's new book is the same strange mixture of first-rate legal argument and crude propaganda. In content, however, there have been a number of additions, especially Part V, which deals with international organizations. Professor Tunkin minimizes the differences between constituent treaties of international organizations and other treaties. In interpreting constituent treaties he is a strict constructionist and believes that international organizations have no inherent jurisdiction and few implied powers; somewhat inconsistently perhaps, he argues that the right of member States to withdraw from international organizations is an implied term of all constituent treaties. International organizations can have legal personality, but the question whether they actually do have legal personality, and the extent of their legal personality, depend on the constituent treaty of each individual organization; there are no general rules, except that 'the charter of an international organization as an international treaty is binding only upon its members, and therefore, the legal personality of an international organization is binding only upon the members of this organization' (p. 364). Other new passages include a brief discussion of human rights (pp. 79-83), in the course of which the author denies that the relevant rules confer rights under international law on individuals (p. 83).

Probably the most fascinating part of the book is Part II, which deals with the sources of international law, and which includes much expanded discussions of *jus cogens* and of international organizations. On some points the author seems to have shifted his position slightly. For instance, he is now more cautious about the possibility of subsequent custom amending a treaty (compare pp. 146 and 339-40 of the present book with pp. 92-5 of the French translation of his earlier book). Conversely, he is now more ready to admit that general principles of (municipal) law can pass into the corpus of international law in the form of treaties and customs than he was in 1962 (compare pp. 200-2 of the present book with pp. 126-7 of the French translation of his earlier book).

MICHAEL AKEHURST

*L'Affaire Delcourt.* By JACQUES VELU. Brussels: Éditions de l'Université de Bruxelles, 1972. 77 pp. Bfr. 270.

*Le Droit de recours effectif devant les instances nationales en cas de violation d'un droit de l'homme.* By PIERRE MERTENS. Brussels: Éditions de l'Université de Bruxelles, 1973. 154 pp. Bfr. 480.

Both of these books, which are published under the auspices of the Centre d'Études de Droit du Conseil de l'Europe of the University of Brussels, are concerned with aspects of the European Convention on Human Rights. The former deals with the right to a fair hearing in judicial proceedings; the latter with the right to an effective remedy for violations of the rights and freedoms set out in the Convention.

M. Velu's book is devoted to a consideration of the first sentence of Article 6 (1) of the Convention in the context of the *Delcourt* case. The applicant alleged that his right to a fair hearing had been violated as a consequence of the Belgian Cour de Cassation's failure to observe the rule of *l'égalité des armes*, a version of the principle *audi alteram*

*partem*. The specific complaint arose out of a long-standing rule of procedure which permits a member of the *Ministère public* to retire with the Cour de Cassation, without voting rights, when it considers its judgment. Within that framework the author carries out a thorough and detailed analysis of the right to a fair and public hearing by an independent and impartial tribunal. The scope of Article 6 (1) is first discussed. Then the doctrine of *l'égalité des armes* is expounded and its compatibility with the rule of procedure in issue is considered both from the point of view of principle and in the specific context of the *Delcourt* case. The arguments of both applicant and respondent, the opinion of the Commission of Human Rights and the judgment of the Court of Human Rights are given full consideration. Apart from its value as a commentary on an important provision of the Convention, this book also illuminates the roles of the *Ministère public* at various levels of the Belgian court system.

M. Mertens's canvas is somewhat larger. His book is concerned with Article 13 of the Convention, which provides that those whose rights and freedoms are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. The author first deals with the origins of the right to an effective remedy as it is set out in the Convention. He begins with similar provisions in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and, drawing on their *travaux préparatoires*, he traces the development of the remedial concept. Comparisons are also drawn with rules guaranteeing access to the courts, particularly the Latin-American concept of *amparo* or judicial protection as it is expressed in the Bogotá Declaration.

The remaining and larger part of the book is then principally devoted to an analysis of the text of Article 13. The matters discussed include the nature of the right guaranteed by Article 13, the nature and effectiveness of the remedy and the types of act and of organs of state against which a remedy may be claimed. In addition M. Mertens considers Article 13 in the light of the rule concerning the exhaustion of local remedies contained in Article 26. He also touches upon the question of the direct applicability of Article 13 in national law. Using both case law and *travaux préparatoires* the author has made a useful contribution towards a better understanding of the significance of a rather ambiguous provision of the Convention.

Both books are welcome additions to the literature on the European law of human rights.

J. W. BRIDGE

*The Concept of Discrimination in International Law with Special Reference to Human Rights.* By E. W. VIERDAG. The Hague: Martinus Nijhoff, 1973. 176 pp. (including index). Gld. 31.50 (paper cover).

Writing in 1954, Professor Kunz suggested that, at the end of the First World War, protection of minorities was the great fashion but today the well-dressed international lawyer wore human rights. If that is still so then his overcoat is surely discrimination, and Dr. Vierdag's book is a timely attempt to explain the concept and relate it to the concepts of equality, differentiation and minority protection. The book does not purport to be a major treatise—its purpose is to define the scope and content of 'discrimination' as that concept is used in the international law of human rights.

Because of its restricted scope many matters are covered cursorily—if at all—and must await further exegesis by Dr. Vierdag and others. For example the fate of the Minorities Treaties as detailed in the debates of the League Assembly are not fully examined and, although some of the work of the United Nations Subcommission on the Prevention of Discrimination and Protection of Minorities is referred to, the important work of some other United Nations organs is not discussed at all. Nor is there an adequate survey of the jurisprudence of the United States and Indian Supreme Courts



interpreting equality and discrimination clauses. One useful decision referred to is *Alt-schuler's* case (Supreme Court of Palestine, *Annual Digest*, vol. 4, p. 55), but an important dissent is merely described as 'interesting' and not analysed.

The book is divided into two sections. Part One deals with the meaning of 'equality' and 'inequality', the notion of 'treatment' and the definition of 'discrimination'. Part Two investigates non-discrimination clauses in human rights conventions and contains a particularly enlightening analysis of the grounds upon which a forbidden differentiation may be based. It also deals briefly with the principle of minority protection and its relationship to non-discrimination. A discussion of the German authors is useful for those unfamiliar with the language, although the quotations would have been more helpful if translated into English.

Particularly valuable is Dr. Vierdag's acceptance that the term discrimination in international usage has a pejorative meaning and is not to be confused with a mere differentiation which may or may not be unlawful (p. 51). He thus rightly rejects the concept of positive discrimination in favour of compensatory treatment which may be justified in certain circumstances. He points out that the non-discrimination principle requires certain differentiations in order to achieve genuine equality. Minority protection is not an exception to the rule of non-discrimination but a necessary part of it. However, he might also have stressed that, while special measures of protection are normally of a temporary nature and designed to be discontinued when material equality is obtained, minorities desire the permanent preservation of their cultural, linguistic and religious practices.

After examining a number of definitions of discrimination he provisionally defines discrimination as 'wrongly equal, or wrongly unequal treatment'. This is further elaborated as follows: 'Diserimination occurs when in a legal system an inequality is introduced in the enjoyment of a certain right, or in a duty, while there is no sufficient connection between the inequality upon which the legal inequality is based, and the right or the duty in which this inequality is made.' 'Wrongly equal treatment' is elaborated as follows: 'Discrimination occurs when in a legal system no inequality is introduced in the enjoyment of a certain right, or in a duty, and as a result thereof no sufficient connection exists between the unequalness of the subjects treated and the right or duty' (p. 61).

These definitions are neither self-contained nor entirely satisfactory. They do not help the reader to distinguish the notions of discrimination and differentiation or equality and identity. The reviewer would prefer to turn the definition around. Thus the quality of individuals under international law does not require 'mathematical' equality or identity of treatment but includes two complementary notions: (1) the principle of non-discrimination, a negative aspect of equality designed to prevent differential treatment on improper grounds or as the result of unreasonable classifications, and (2) the principle of special measures of protection, the positive aspect of equality which may require differential treatment in certain circumstances.

The material is not as well organized as it might have been and the syntax is occasionally too convoluted. A more comprehensive index and a separate case list would have been welcome. None the less, the book provides a much needed introduction to the subject and provides the basis for further detailed work in a complicated but vitally important field.

W. A. McKEAN

*Treaty-Making Power and Constitution. An International and Comparative Study.* By LUZIUS WILDHABER. Basle: Helbing and Lichtenhahn, 1971. xxii+398 pp.+indices. Fr. 52.

In this substantial volume the author identifies the main legal issues surrounding the treaty-making power as the apportionment of responsibility between executive and judiciary for the conclusion and implementation of treaties and the question of judicial



review of the compatibility of treaties with the substantive and procedural requirements of the domestic constitution. By surveying the theory and practice of treaty-making in eleven Western States Dr. Wildhaber in the first section of his study seeks to demonstrate that, behind municipal systems which appear to handle the treaty-making power in very different ways, there is to be found a fundamentally similar approach. If this attempt is not always entirely convincing, it can at least be said to have produced a number of striking similarities and illuminating comparisons.

The conclusion of treaties, for example, is seen by the author as a mixed legislative-executive activity, not only in the United States where this is obviously the case, but also in the United Kingdom, where, the author argues, the combined effect of the Ponsonby rule, the practice of concluding treaties subject to Parliamentary approval, consultation with Parliament before or after signature and the passing of enabling acts prior to ratification has done much to erode the traditional idea of executive autonomy. In general terms this conclusion seems justified. It is, however, subject to two important qualifications. One, which the author notes, is the increasing use of executive agreements to bypass legislative approval in States where this is constitutionally necessary, a development which, as Professor Smets has shown in *La Conclusion des accords en forme simplifiée*, has had the effect of removing an increasing number of agreements from legislative scrutiny. The other qualification, which Dr. Wildhaber could perhaps have emphasized, is the bearing which the general constitutional arrangements in a State have upon the legislative handling of treaty questions. To revert to the British example, whatever Parliamentary examination of treaties may occur, the effective power of the legislature is necessarily circumscribed by the government's majority. Although therefore it may be permissible to characterize treaty making as a joint legislative-executive activity in Britain and in the United States, it must always be remembered that the processes thus described are really quite different.

Dr. Wildhaber would like to see legislatures playing an increasing role in the treaty-making field on the grounds that democratic control is the best protection against arbitrary executive acts. It must be doubtful, however, whether this is really a very persuasive argument. In a most interesting chapter Dr. Wildhaber notes the obstacles which the procedure of submitting treaties to referendum has on occasion placed in the path of Swiss foreign policy. The experience of the United States suggests that the requirement of legislative approval can cause similar difficulties and for much the same reasons. Although popular control can sometimes be effective in preventing undesirable executive actions, it is clear that by causing excessive deference to be paid to parochial perspectives it can also seriously obstruct attempts to pursue an enlightened foreign policy.

The second section examines the problem of treaty-making in federal States. The author's analysis reveals that aside from the special cases of Quebec, Byelorussia and the Ukraine, the treaty-making powers of constituent States are insignificant and the powers of federal authorities correspondingly large. Dr. Wildhaber has no difficulty in accounting for this tendency, though perhaps the centripetal tendencies to be found in all federations should also have been mentioned. The latter are certainly highly relevant to the crucial question of the distribution of treaty performing powers between constituent States and the federal authorities. As the author explains, the various federal States examined handle this question very differently. Though the author favours more federal authority in this area he might perhaps have brought out more clearly the fact that such a development raises fundamental questions about the continued existence of the truly federal State in the modern world.

The final section deals with the question of judicial review. Here it is evident that the powers possessed by municipal courts to examine treaties for conformity with the domestic constitution are usually more apparent than real. It is useful to have Dr. Wildhaber's account of how courts on the Continent and in the United States have tackled the kinds of issues recently raised in the Court of Appeal in *Blackburn v. Attorney General*, [1971] 1 W.L.R. 1037. Their answers, though differing in detail, are remarkably similar in

their reluctance to cause the diplomatic embarrassment which might follow from holding treaties to be unconstitutional. This reluctance leads the author to question the real significance of constitutional limitations on the treaty-making power. His conclusion, and it is surely right, is that such checks are malleable but not meaningless. Though often bypassed they impose real limitations. More significant, however, are the usages and constitutional conventions invariably surrounding the treaty-making power which are the main check on executive freedom.

Though most of the present work is necessarily concerned with domestic law, there is a useful discussion of the evolution and interpretation of Article 47 of the Vienna Convention on the Law of Treaties and a concise account of international judicial decisions on the relevance of constitutional provisions to the validity of treaties in international law.

This is a well-written and well-organized book on an important theme. Its analysis is interesting and its conclusions provocative. It can be recommended.

J. G. MERRILLS

*The Changing Law of the Sea: Western Hemisphere Perspectives.* Edited by RALPH ZACKLIN. Leyden, A. W. Sijthoff, 1974, 272 pp. Dfl. 47.

In view of the Third United Nations Conference on the Law of the Sea now being held, this is a timely book. It comprises chapters describing and discussing the current attitudes of coastal American States towards the international law of the sea as reflected in their municipal law. The chapters have been written by academics from the countries in question.

After two chapters dealing with Canada and the United States respectively, there is a Latin-American 'overview' written by the editor which precedes the chapters on individual Latin-American countries or areas. In his overview, the editor, like Hjertonsen in *The New Law of the Sea (supra)*, stresses the differences in Latin-American practice: e.g. Venezuela, Colombia, Mexico and most of the Caribbean States claim at present only a relatively narrow belt of territorial sea; Chile, Argentina, Uruguay and some Central American States claim a narrow belt of territorial sea properly so called, with an additional zone of limited sovereignty extending to 200 miles; Brazil, Panama, Ecuador and Peru claim a 200-mile belt of full territorial sea. He remarks that at first sight a consensus would appear out of reach but concludes that the basis for one could be found in a new formula for zones of special jurisdiction adjacent to the territorial sea.

It is not proposed to review at length the individual chapters, which are all valuable in their detailed references to local laws, practices and writings. All the coastal Latin-American countries are covered except Ecuador, an omission regretted by this reviewer since Ecuador, as well as being one of the four States claiming a full territorial sea of 200 miles, has in the Galapagos Islands the only oceanic archipelago. Among the many interesting issues treated in the individual chapters are the Canadian pollution prevention zone, the Mexican attempts to apply straight baselines in the Gulf of California, the concept of 'epicontinental sea', the Venezuela-Colombian dispute over the Gulf of Venezuela and the differential fishing zones within the Brazilian 200-mile territorial sea. Particularly interesting is the fact that the Chilean, Argentinian and Uruguayan 'territorial seas' do not seem to have abridged the freedoms of navigation and overflight. The legal justifications for the extensive Latin American claims are not discussed in detail in the volume, possibly owing to lack of space; where such an explanation is given, as by the Brazilian and Uruguayan writers, it is based on the absence of any rule of treaty or customary law to the contrary. The volume concludes with the texts of the 1958 Geneva Conventions and of regional and bilateral instruments and declarations.

To sum up, this work is scholarly, informative and well produced. It reflects credit on its editor, the contributors and the Carnegie Endowment for International Peace which sponsored it.

GEOFFREY MARSTON



*New Directions in the Law of the Sea.* Compiled and edited by S. HOUSTON LAY, ROBIN CHURCHILL, and MYRON NORDQUIST. Vols. I and II, 1973, *Documents*, xxii+911 pp. £16; Vol. III, *Collected Papers* (edited by Robin Churchill, K. R. Simmonds and Jane Welch), 1974, xxiv+358 pp. £7.75; Vol. IV, *Documents*, 1975, xxix+544 pp. £10.50. Complete set, £33. London: British Institute of International and Comparative Law; Dobbs Ferry, New York: Oceana Publications, Inc.

*La Actual Revisión de Derecho del Mar: Una Perspectiva Española.* Vol. I, edited by ANTONIO POCH Y GUTIÉRREZ DE CAVIEDES: Part I, 586 pp.; Part II, 584 pp. Vol. II, *Textos y Documentos*, compiled by JOSÉ ANTONIO DE YTURRIAGA: Part I, 689 pp.; Part II, 552 pp. Madrid: Instituto de Estudios Políticos, 1974. 1300 pesetas.

*Third United Nations Conference on the Law of the Sea: Documents of the Caracas Session 1974.* Compiled and introduced by RENATE PLATZÖDER. Hamburg: Maritime Law Association of the Federal Republic of Germany; and Institute of International Affairs of the University of Hamburg. 1975. xvii+371 pp. DM.34.

*Verträge und Deklarationen über den Festlandsockel.* Edited by BERND RÜSTER. Frankfurt am Main: Alfred Metzner Verlag GmbH. 1975. 181 pp. DM. 22.

Readers of the *Year Book* may find a short memorandum of recent collections of documents on the law of the sea helpful. The items chronicled, together with the volume edited by Shigeru Oda (reviewed at p. 483 of this *Year Book*), are the more recent compilations to come to the notice of the editors. In nearly every case, the title is more or less self-explanatory. However, Volume I of the Spanish contribution consists of collected papers, whilst the volumes of documents focus very much on Spanish legislation and other Spanish practice, together with the Spanish texts of the relevant treaties. The British Institute volumes, apart from their substance, are attractively presented.

IAN BROWNLIE

*Canadian Conflict of Laws.* By J.-G. CASTEL. Toronto: Butterworths, 1975. xxv+800 pp.

Professor Castel intends his new book to be the first of a trilogy. It does not deal with choice of law in the Common Law provinces of Canada, nor does it deal except incidentally with the conflict of laws in the Province of Quebec: the author plans to devote the second and third volumes of his trilogy to these two areas of what is not only broadly, but also deliberately, designated the Canadian Conflict of Laws. In Canada the sometimes near phrenetic search for a national identity has become proverbial in many fields of human endeavour. Professor Castel proclaims in his Preface that 'The recent wealth of legislative enactments and case law dealing with conflict of laws, the special problems of a federal system such as the one existing in Canada, as well as the habits of the people of a country which is in large part made up of immigrants require solutions that are truly Canadian', and he expresses the hope that his book will 'help in the further development of a Canadian doctrine and jurisprudence'. The author's emphasis throughout is undoubtedly upon Canadian material: for example, of the 1,500 or so cases cited considerably more than 80 per cent were decided by Canadian courts. What is more difficult to discern is the emergence in many areas of new, let alone distinctly Canadian,



ideas. The fault, if such it be, lies, of course, not with Professor Castel but with generations of traditionalist Canadian judges. What Professor Castel has done is to present a treatise firmly based upon an extremely full and up-to-date corpus of Canadian statutes and cases. An assessment of the first volume of a three-volume project must in some ways be of an interim nature. There is room for the view that the unity of the subject requires that the treatment of general principles, jurisdiction and foreign judgments cannot sensibly be regarded in isolation from consideration of choice of law. There is also room for the view that in contemporary Canada, a legal study, especially of a subject such as the conflict of laws, from which developments in Quebec are missing, must seem disturbingly incomplete. It is, therefore, not only on account of the more obvious merits of the present volume that the present reviewer expresses the hope that the publication of the other two parts of the trilogy will not long be delayed.

The first volume begins with an introduction to the subject: it is short and relatively traditional although incorporating some slight reference to the much publicized 'theories' propounded south of the forty-ninth parallel during recent decades. The section on Canadian literature on the conflict of laws is useful if significantly brief. The treatise itself is then divided into three Parts, respectively entitled General Principles, Jurisdiction of Canadian Courts and Foreign Judgments.

Part I embraces the treatment of such topics as characterization, *renvoi*, the incidental question, penal and revenue laws, domicile and residence. There is also a chapter on constitutional aspects of the Canadian conflict of laws. The chapter on procedure, which includes discussion of the distinction between substance and procedure, is inexplicably placed, as if by way of postscript, at the end of Part III on Foreign Judgments.

It is perhaps a sign of the times that the section on residence is longer than that on domicile. In Canada, as elsewhere, residence in various forms is taking the place of domicile as a test of the personal law in many contexts. Professor Castel does not share the illusion that this change necessarily constitutes a simplification: 'The term "residence", as has frequently been judicially noted, is of an extraordinarily vague, inexact and elastic nature.'<sup>1</sup> His subsequent treatment of the subject, particularly for the purposes of S. 5 (1) (b) of the Canadian Divorce Act, 1968, which introduced actual and ordinary residence as jurisdictional factors, is full and helpful; but many would not accept his contention that 'Unlike domicile, residence is not "an idea of law": it is an objectively ascertainable conclusion of fact'.<sup>2</sup> Is not each a legal concept connoting a relationship between a range of fact situations and a certain pattern of legal consequences? It may well be that the determination of the existence of a residence fact situation tends to be easier from an evidentiary point of view than is the determination of a domicile fact situation, and that this is due to the greater emphasis placed upon the state of mind of the *propositus* in the latter case. This difference is, however, one only of degree. Moreover, it is a difference which seems likely to diminish if in determining ordinary residence increasing account is also taken of intention.<sup>3</sup> The advantage of residence over domicile as a connecting factor is not that its determination involves a question of fact rather than one of law, but that its adoption frees courts from the constraints of the idiosyncrasies, indefensible in policy terms, which have become part of the Common Law concept of domicile. Some may take the view that the baby is being thrown out with the bathwater and that the law of domicile could have been reformed and up-dated. Such reform and updating might, as Professor Castel urges,<sup>4</sup> involve a marked shift of emphasis from the intention factor to the residence factor. Indeed, the matter might become largely terminological. But, be this as it may, the fundamental difficulty is that the nature of the factual relationships that can exist between a person and a law district are almost infinitely various. The reduction to any verbal formula of such of those relationships as it is thought

<sup>1</sup> p. 138.

<sup>2</sup> p. 136.

<sup>3</sup> See, e.g., the Saskatchewan case of *Girardin v. Girardin and Fisk*, (1974) 43 D.L.R. (3d) 294, cited by Castel at p. 158.

<sup>4</sup> pp. 133 et seq.

desirable should give rise to a particular legal consequence (e.g. the grounding of jurisdiction to divorce) is unavoidably intractable, regardless of the terminology to which resort is made.

So far as residence is concerned, Professor Castel clears some of the ground by emphasizing that the word can mean different things in different statutory contexts.<sup>1</sup> He does not, however, deal with the suggestion, first ventilated by the late W. W. Cook,<sup>2</sup> that a person might similarly at Common Law have differing domicils for different purposes. At the same time the learned author does deal very lucidly with a superficially similar problem, namely that to which the emergence of a statutory Canadian (as distinct from Provincial) domicile has given rise. For the purposes of divorce jurisdiction at least<sup>3</sup> the determination of Canadian domicile is by reference to Common Law criteria. Here it is the concept of the law district, rather than the concept of domicile, that has ceased to be a unitary one.

His treatment of the personal law is one of the areas in which Professor Castel permits himself some brief reference<sup>4</sup> to the Civil Law position in Quebec. No doubt this will be dealt with much more fully in the projected volume on Quebec conflicts, but the mention of the recommendations of the Comité sur le Domicile de la Personne Humaine to the Quebec Office de Revision du Code Civil is particularly interesting. Since Professor Castel wrote, the wording of the definition of domicile there proposed has been slightly revised in the *Rapport* published in 1975 and it now runs as follows: 'Le domicile d'une personne physique est au lieu de sa résidence habituelle' (Art. I). This recommendation must be seen in the context of the present Article 79 of the Quebec Civil Code which it is designed to replace. Article 79 defines domicile as the place where a person has his 'principal établissement'. The emphasis upon intention is already less marked than it is in the Common Law concept of domicile. An object of the new proposal is to reduce still further the significance of intention as such. The new emphasis is rather upon the factual stability of the actual territorial link. Intention remains an evidentiary factor, but, as Professor Castel concludes, 'stability may take the form of either a greater length of stay or a particularly close tie between the person and the place'.<sup>5</sup> A common lawyer cannot resist the thought that a motion of domicile along these lines would have better survival prospects as a test of the personal law than its present Common Law counterpart. Be this as it may, it is apposite that Professor Castel has transgressed his self-imposed boundary between Common Law conflicts and Civil Law conflicts in dealing with this topic in the avowedly Common Law volume of his trilogy. It is perhaps a matter for regret that there have not been a greater number of similar transgressions in other areas of his subject.

Professor Castel's characteristic approach to a controversial problem is to put both sides of the issue with scrupulous fairness before proceeding to a conclusion. His treatment of the doctrine of *renvoi* seems to be exceptional. Then he asserts that 'The practical disadvantage of the theory of *renvoi*, for instance the cost of foreign experts, by far outweighs whatever validity it may have',<sup>6</sup> and concludes that 'the theory of *renvoi* is not and ought not to be part of the conflict of laws of the common law provinces of Canada'.<sup>7</sup> The problem, which can be of crucial importance, is disposed of in some eight pages and in a way which the present reviewer finds surprising, superficial and disappointing.

The treatment of the general principles of the subject in Part I is broadly comprehensive, but it is possible to detect some apparent lack of balance in the amount of space devoted to different topics. For example, twenty pages are devoted to the 'Time Element' whereas the 'Incidental or Preliminary Question' is disposed of in three and a half pages.

<sup>1</sup> pp. 141-2.

<sup>2</sup> Cook, *The Logical and Legal Bases of the Conflict of Laws*, Chapter VII.

<sup>3</sup> The Federal Divorce Act, 1968, S. 5 (1) runs as follows: 'The court for any province has jurisdiction to entertain a petition for divorce and to grant relief in respect thereof if, (a) the petition is presented by a person domiciled in Canada.'

<sup>4</sup> pp. 144-7.

<sup>5</sup> p. 147.

<sup>6</sup> p. 50.

<sup>7</sup> p. 53.



Again, the very full treatment of foreign tax laws extending to some thirty pages contrasts with the rather cursory treatment of foreign penal laws in four pages.

Part II is concerned with jurisdiction. The author deals with jurisdiction *in personam* in Canadian federal and provincial courts and with admiralty jurisdiction both *in rem* and *in personam* in the federal courts. The treatment is painstaking and thorough and it will be of obvious value to the Canadian practitioner.

Moreover many sections will be of wider interest: the sections on the doctrines of *forum conveniens* and *lis alibi pendens* provide examples of this. It is, however, a little disappointing, particularly in a work so Canadian in its orientation, that the treatment of a decision such as that of the House of Lords in *The Atlantic Star*<sup>1</sup> should not be more rigorously critical. There the House, by a majority of three to two and reversing the Court of Appeal, stayed English proceedings on the ground that proceedings had already been commenced in Belgium. The majority purported to act within the traditional English approach as classically stated by Scott L.J. in *St. Pierre v. South American Stores Ltd.*: '(1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.'<sup>2</sup> The majority overtly rejected the doctrine of *forum conveniens*, and Professor Castel appears willing to accept this rejection at its face value. It is, however, respectfully suggested by the present reviewer that, reading the three majority judgments in *The Atlantic Star*, it is difficult to resist the conclusion that, although lip service was paid to old formulations, a marked change was effected. That change was not limited to treating particular words more liberally, nor was it one merely of emphasis. Lord Wilberforce was not simply broadening the meaning of the crucial words 'oppressive' and 'vexatious', he was fundamentally altering their role in Scott L.J.'s formulation. They no longer delimit a jurisdiction; they now merely illustrate it. Again, whereas Scott L.J.'s rule expressly places a burden upon the defendant to prove a negative, namely, that a stay would not cause an injustice to the plaintiff, both Lord Reid and Lord Wilberforce treated the problem as being to some extent one of balancing the interests of both parties. The former said: 'The position of the defendant must be put in the scales',<sup>3</sup> and the latter: 'I think, too, that there must be a relative element in assessing both advantage and disadvantage—relative to the individual circumstances of the plaintiff and defendant.'<sup>4</sup> The majority judgments, especially that of Lord Kilbrandon, were overcast by the shadow of the notion of the objectively appropriate *forum*. Indeed, one gets the clear impression that, as the dissentient Lord Simon of Glaisdale pointed out, there was a move to 'admit by the back door a rule that your Lordships consider cannot be welcomed at the front'.<sup>5</sup>

The doctrine of *forum conveniens* has undoubtedly been accorded some recognition in Canada, but, as Professor Castel admits, the 'difficulty with the Canadian cases is that the courts have used both the doctrine of *forum conveniens* and that of abuse of process in order to stay the actions'.<sup>6</sup> It is respectfully suggested that in England too, despite their Lordships' protestations in *The Atlantic Star*, the two doctrines were in effect intermingled there. This is unfortunate because both the starting-points and the purposes of the two doctrines differ. A need for a doctrine of *forum conveniens* stems from deficiencies in the formulation of jurisdictional rules. That doctrine bestows a discretion

<sup>1</sup> [1974] A.C. 436. The case is dealt with fully but in a somewhat neutered way at pp. 284 and 301 et seq.

<sup>2</sup> [1936] 1 K.B. 382, 398.

<sup>4</sup> Ibid. at p. 469.

<sup>6</sup> p. 294.

<sup>3</sup> [1974] A.C. 436, at p. 454.

<sup>5</sup> Ibid. at p. 473.



to mitigate the effects of such deficiencies in appropriate cases. The exercise of this discretion involves the balancing of diverse and unquantifiable objective factors of 'appropriateness'. The doctrine of *lis alibi pendens* is directed against the vexatious litigant. Any court must have an ultimate power to prevent its process being abused by him: this must be so, whatever the court's jurisdictional rules may be and regardless of whether they are, or are not, tempered by a doctrine of *forum conveniens*.

Part III is entitled 'Recognition and Enforcement of Foreign Judgements in Personam and in Rem and Arbitration Awards'. Professor Castel here deals not only with general principles and the substantive law, but also, and very fully, with procedural questions. Like Part II this will be of undoubted value to practitioners. The emphasis in this Part is again distinctly Canadian. At the same time attention is drawn to divergences within Canada: in this connection it is interesting to compare, for example, the variation between Provincial statutory modifications of the Common Law rule that foreign judgments are conclusive on the merits.

When dealing with the question of submission by the defendant to the jurisdiction of the foreign court, Professor Castel takes the sturdy common-sense view that 'A special or conditional appearance entered by the defendant solely for the purpose of objecting that the court has no jurisdiction over him should not subject him to the jurisdiction of the court'.<sup>1</sup> He regards such an appearance as being no more than 'a request that the court advise whether the defendant must answer or suffer a valid default judgement'.<sup>1</sup> There is no doubt much to be said for this simple approach, but, although the issue was not squarely raised there, an English reviewer may be permitted to conjecture as to how the author would regard the case of *Henry v. Geopresco International Ltd.*<sup>2</sup> decided by the English Court of Appeal since he wrote. The problems involved might seem in any event to merit fuller and rather more sophisticated treatment than Professor Castel accords them.

In discussing the effect of a foreign judgment in favour of the defendant<sup>3</sup> Professor Castel is severely critical of the traditional non-merger doctrine: 'The non-merger rule is a vestige of the common law procedure and does not appear now to be logically necessary in view of the obsolescence of the forms of action, nor is it defensible from the point of view of economy of litigation and justice.'<sup>4</sup> He regards the rule that, when a foreign judgment has already been given in favour of the defendant, the plaintiff cannot sue again on the original cause of action as 'a sound rule',<sup>4</sup> but he draws attention to its inconsistency with the non-merger doctrine. Not surprisingly he does not mention in this context the old case of *Harris v. Quine*,<sup>5</sup> where it was held that dismissal of an action in a foreign court on account of the expiry of a limitation period which did not destroy the plaintiff's right but merely made it unenforceable, was not a bar to subsequent proceedings in England on the same cause of action. Since Professor Castel wrote, this long-dormant anomaly has been resuscitated by the House of Lords in *Black-Clawson Ltd. v. Papierwerke A.G.*<sup>6</sup> One might suppose that Professor Castel would take the view that on this point the laws of England and Canada must now be regarded as diverging. On the other hand it is to be noted that in his concluding chapter on procedure the learned author does appear to be resigned to Canadian acceptance, so far as choice of law is concerned, of the dogma that statutes of limitation, in so far as they affect merely the remedy, are procedural. He confines his criticism here to the comment that, 'In general, Canadian courts have had a tendency to characterise foreign as well as domestic statutes of limitations as procedural with the result that the defendant is often deprived of the benefit of the foreign statute in an action upon a foreign cause of action'.<sup>7</sup> The restraint of this criticism is itself a little surprising having regard to the author's advocacy of

<sup>1</sup> p. 434.

<sup>2</sup> [1976] 1 Q.B. 726.

<sup>3</sup> pp. 478-83.

<sup>4</sup> p. 482.

<sup>5</sup> (1869) L.R. 4 Q.B. 653.

<sup>6</sup> [1975] 2 W.L.R. 513.

<sup>7</sup> p. 611. Cf., e.g., Cheshire, *Private International Law* (9th ed.) at p. 689: 'This is another example when English law, through its failure to interpret a foreign rule in its context has gone astray.'

a flexible and policy based approach to the general problem of distinguishing between substance and procedure.<sup>1</sup> There, as elsewhere in his treatise, he aptly invokes words of his distinguished Osgoode Hall predecessor, the late J. D. Falconbridge, '... a court should not, without due consideration of the consequences, characterise a rule of law of the *forum* as procedural in the conflict of laws, even though the rule may be characterised as procedural for some domestic purposes'.<sup>2</sup> As the present author adds: 'The test should be: is the foreign rule too inconvenient to apply? If the answer is negative the foreign rule is substantive.'<sup>3</sup>

In reviewing a treatise of the scope and quality of Professor Castel's new book comments are almost inevitably somewhat random; the foregoing observations are no exception. Moreover, particular criticisms can give a wrong impression if not seen in the perspective of the whole work. In the present case this means the perspective of a major contribution to Canadian legal literature. Professor Castel's treatise together with his case book,<sup>4</sup> the third edition of which was published in 1974, constitutes a uniquely full but compact repository of source materials and references on the Canadian conflict of laws. It would probably be difficult to over-estimate its immense utility to Canadian practitioners and students in this regard. At the same time the learned author's treatise will be of great value to any scholar outside Canada who wishes to familiarize himself or herself with a point of Canadian conflicts law.

P. B. CARTER

<sup>1</sup> Esp. pp. 600-3.

<sup>2</sup> Falconbridge, *Essays on the Conflict of Laws* (2nd ed., 1954), pp. 292-3.

<sup>3</sup> p. 602.

<sup>4</sup> Castel, *Conflict of Laws, Cases, Notes and Materials* (3rd ed., 1974).

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